Vol. 81

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81 I.A.2 54

Case No. 66-45

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

MARY BERRY,
Plaintiff-Appellee,

vs.

VIVIAN LEWIS,
Defendant-Appellant.

Appeal from the Circuit Court of LaSalle County.

Honorable Leonard Hoffman, Judge Presiding.

Abstract

STOUDER, P.J.

Plaintiff Appellee, Mary Berry, commenced this action in the Circuit Court of LaSalle County against Defendant Appellant, Vivian Lewis, seeking damages on account of Defendant's alleged negligent operation of her automobile. Judgment was entered on the verdict of the jury for $11,250.00. This appeal follows from the court's denial of Defendant's post trial motion for a new trial.

On September 18, 1964, Defendant was operating her car in a westerly direction on U.S. Route 6. It was raining heavily at the time and after she came around a curve she ran into a pool of water and applied her brakes. The car skidded causing the rear end to swing around so that it was headed east in the east bound lane of the highway. Moments later Defendant's car was struck in the rear by the car of Plaintiff, being operated in a easterly direction along said highway. In seeking a reversal of the trial court's order denying her motion for a new trial Defendant argues that the judgment is excessive and that prejudicial error was committed in the selection of the jury.

Although Defendant assigns as error prejudice in the selection of the jury we are unable to consider this assignment of error since there is no record of the examination of the prospective jurors and consequently there is no basis for

determining the existence or non-existence of the prejudicial error complained of.

The sole issue before us is Defendant's contention that the jury's award of damages is excessive and not supported by the evidence.

Plaintiff testified that shortly after the mishap, although she declined immediate medical attention, she did complain of pain in her left arm and leg to the investigating deputy sheriff. Thereafter on the same day Plaintiff went to her family physician, Dr. Johnson, who examined her, finding numerous bruises together with pain and tenderness in the left foot and knee. No x-rays were taken since the doctor believed there were no broken bones. He bandaged the knee and foot and directed Plaintiff to soak her left leg in hot water. Plaintiff resumed her regular employment as a waitress less than a week after the mishap. However her left foot and knee continued to be swollen and sore, and she returned to the doctor a week or two later. X-rays were taken which were negative concerning bony pathology. Plaintiff saw Dr. Johnson on three other occasions, the last occasion being on November 10, 1964, on which occasion she complained of pain and swelling in her left knee and ankle although the doctor indicated that she was improving. Plaintiff did not again see Dr. Johnson with respect to these conditions. On November 11, 1964, Plaintiff was examined by Dr. McKinney. Dr. McKinney's examination revealed that Plaintiff had varicose veins on both legs, a painful swelling over the arch of her left foot, and tenderness and pain over her left knee cap or patella. Dr. McKinney testified that the left foot and ankle had a normal range of motion, that x-rays thereof negatived a diagnosis of bone injury, and that the injury to the foot was to the soft tissue. According to Dr. McKinney, the left knee also had a normal range of motion, but pain and a grating sensation were produced by certain types of movements. An x-ray of Plaintiff's left knee taken that day by Dr. McKinney indicated an irregularity at the lower end of the knee cap or patella. He diagnosed this roughening of the patella as a case of mild osteochondritis, a condition which he stated produces pain upon motion of the knee. It was Dr. McKinney's opinion that this condition was per-

manent in nature but that it could be treated conservatively by soaking the knee, cortisone injections, and medications taken orally. Dr. McKinney did not treat Plaintiff but testified that his examination shortly before trial revealed no change in Plaintiff's condition from that which he had observed in November, 1964.

Dr. Johnson testified concerning his examination and treatment of Plaintiff on September 18, 1964 through November 10, 1964, indicating that the Plaintiff had pain, tenderness and swelling in her left foot and left knee. Such condition had improved but was not entirely alleviated on the date of last treatment. Dr. Johnson examined Plaintiff shortly before the trial and also examined the x-rays taken by Dr. McKinney on November 11, 1964. His diagnosis, the same as Dr. McKinney's, was that Plaintiff at the time of trial was suffering from osteochondritis of the left knee. In explanation of the apparent conflict of his x-rays and those taken by Dr. McKinney he explained that where osteochondritis is traumatic in origin it may not develop for a period of two to eight weeks. He also expressed the opinion that the condition was caused by the accident, was permanent and would become progressively worse.

At the time of trial Plaintiff was 46 years of age. She testified that her only income was that which she received as a waitress and that she had worked for her present employer $4\frac{1}{2}$ years. Immediately after the accident she did not work for three days and after her return to work she was absent an additional six or seven days as a result of the injury. She estimated her wage loss at about $100.00. The only other special damages to which she testified were $37.00 doctor bills and $350.00 damages to her automobile.

The question before us is whether the total amount of the verdict falls within the necessarily flexible limits of fair and reasonable compensation or is so large as to shock the judicial conscience. Barango v. E. L. Hedstrom Coal Co., 12 Ill. App. 2d 118, 138 N.E. 2d 820. The assessment of damages is preeminently the function of the jury. Zanter v. Hough, 35 Ill. App. 2d 72, 181 N.E. 2d 831. We do not believe that the amount of the verdict is so palpably erroneous as to

demonstrate that such verdict is based on passion and prejudice. The absence of evidence of substantial medical expenses or of loss of earnings does not necessarily require the conclusion that injuries are not serious. Smith v. Broscheid, 46 Ill. App. 2d 117, 196 N.E. 2d 380. The unrebutted medical testimony indicates that Plaintiff sustained a permanent injury and that as a consequence of such injury the normal use of her knee would be accompanied by pain. Furthermore the testimony that such condition was progressive could support the conclusion that even though Plaintiff's present earnings were not affected such disability might well affect future earnings. Under such circumstances we believe the jury's verdict was within the range of the evidence and supported thereby.

For the foregoing reasons the judgment of the Circuit Court of LaSalle County is affirmed.

JUDGMENT AFFIRMED.

Alloy, J., and
Coryn, J. concur.

81 I.A. 290

No. 66-51M

In The

APPELLATE COURT OF ILLINOIS

Third District

A. D. 1967.

SARAH GILL, Plaintiff-Appellee, vs. FRANCIS TALMADGE and DOROTHY TALMADGE, Defendants-Appellants.	Appeal from the Circuit Court of Will County. Honorable John F. Gnadinger, Magistrate Presiding.

Abstract

ALLOY, J.

This cause originated as a forcible entry and detainer action for recovery of certain real estate sold by plaintiff Sarah Gill to defendants Francis Talmadge and Dorothy Talmadge under a written contract for warranty deed. Plaintiff alleged a right to forfeit the contract because defendants were delinquent in the making of monthly payments and for a further reason that defendants sublet the premises to a third person without the written consent of plaintiff as required by the contract. The cause was tried before a judge of the magistrate division sitting without a jury who found the issues in favor of plaintiff and against defendants and directed the issuance of a writ of restitution.

On appeal in this cause defendants-appellants contend that the contract seller of real estate accepted the benefits of a sublease made

by the contract purchaser to a third party and that the contract seller thereby waived his right to forfeit the contract for violation of that covenant and also that contract purchaser had been permitted to remain delinquent in installments and thereby the seller waived his right to forfeit the contract for failure of defendants to make the payments at designated dates.

The record discloses that there was a default in making of payments. The record also indicates that on the trial of this cause there was no contention or defense made nor was there an argument made to the trial court raising any defense of waiver. Although the trial court fixed a time for filing a statement of facts and briefs for both parties, defendants did not file a written statement of facts nor a brief as requested by the trial court. Plaintiff in this Court contends that the defendants did not raise the issue of waiver or acquiescence as a bar to a forfeiture in the trial court and is improperly raising this issue for the first time on appeal.

Where an issue was not presented to or considered by the trial court it cannot be raised for the first time on review. (WOMAN'S ATHLETIC CLUB v. HULMAN, 31 Ill. 2d 449, 202 N.E. 2d 528, 530; McMILLEN v. RYDBOM, 56 Ill. App. 2d 14, 205 N.E. 2d 813). The record shows that the only contention made by defendants' counsel in the trial of this cause was that defendant Dorothy Talmadge asserted that she was not in default. It is obvious that the theory of the defense has been changed and that a new issue has been raised in this Court which was not raised in the trial court. As indicated in the cases cited, issues not presented to or considered in the trial court cannot be raised for the first time on review.

The judgment of the Circuit Court of Will County will, therefore, be affirmed.

Affirmed.

Stouder, P. J. and Coryn, J. concur.

81 I.A.2 103

Case No. 66-58M

In The

APPELLATE COURT OF ILLINOIS

Third District

A.D. 1967

DIANE SCHMIDGALL, Plaintiff-Appellant, vs. FRED W. ENGELKE and RUSSELL PURSLEY, d/b/a PURSLEY & ENGELKE, Defendants-Appellees.	)	Appeal from the Circuit Court of Peoria County, Illinois. Honorable David C. McCarthy, Magistrate Presiding.

Abstract

STOUDER, P.J.

Plaintiff Appellant, Diane Schmidgall, commenced this action in the Circuit Court of Peoria County against Defendant Appellee, Fred Engelke and Defendant, Russell Pursley, d/b/a Pursley and Engelke. In her complaint she sought recision of a contract and restitution of $1,300.00 paid thereon, basing her action on fraud and deceit and also her minority. Pursley failed to plead and was defaulted. Engelke answered denying the allegations of the complaint. Evidence was heard by the court sitting without a jury and resulted in a judgment against Plaintiff and in favor of each Defendant. During the course of the hearing Plaintiff abandoned her theory of fraud and deceit and relied solely on her minority as the basis for the relief requested. This issue is the only issue raised on this appeal.

In seeking to reverse the judgment of the trial court, Plaintiff argues that such judgment is not supported by either the law or the facts and that in any event she is entitled to a judgment against Pursley, the defaulted Defendant.

The substance of Plaintiff's claim is that on October 29, 1963 she was seventeen years old. Prior to said date, Clifford Schmidgall, Plaintiff's father and

and an attorney, discussed with her the prospect of purchasing a fractional interest in an oil lease. She authorized him to make such purchase from her funds which were in his possession, such funds having been inherited from a grandparent and earned by Plaintiff. On October 29, 1963, the contract for the purchase of the fractional interest was executed, Clifford Schmidgall signing his daughter's name as the purchaser and the Defendant Engelke signing such agreement in behalf of Pursley and Engelke. At the time of the execution Clifford Schmidgall paid Fred Engelke $600.00 as required by the contract. Approximately one month after the execution of the contract Engelke indicated to Clifford Schmidgall that oil had been discovered. Pursuant to a provision of the contract which required the purchaser to pay a proportionate share of the completion cost in the event oil was discovered, Schmidgall paid to Engelke the amount of $700.00, the full amount of the proportionate share of completion costs. The receipt for this payment indicated that it was received from Plaintiff, Diane Schmidgall. The well was apparently unsuccessful and shortly before Plaintiff reached her 18th birthday in March 1964, a declaration of recision and demand for restitution based on Plaintiff's minority was served on Defendants. Upon the failure of the Defendants to comply with such demand this action followed. It is undisputed that she was seventeen years old when the contract was executed.

The substance of Defendant's claim is that his only dealings were with Clifford Schmidgall and at the time the contract was executed Clifford Schmidgall indicated his desire to purchase an interest in the well but that he wanted to give it to his daughter. Defendant further claims that he had no knowledge that Diane Schmidgall was a minor nor that the funds which he received were her funds, that the evidence fails to support any inference that the funds he received belonged to a minor and that the contract was that of the father.

At the outset we feel compelled to note that Clifford Schmidgall, an attorney, represented Plaintiff in the trial of this cause and was one of the principal witnesses testifying in behalf of Plaintiff. The Supreme Court has repeatedly stated

that when an attorney assumes a dual role of representing his client and furnishing evidence to secure success in the litigation, little weight is to be given to his testimony. McKey vs. McKean, et al, 384 Ill. 112, 51 N.E. 2d 189. Subsequent to our calling this matter to the attention of counsel for Plaintiff during the oral arguments heard by this Court counsel for Appellant has moved that his testimony be stricken. We believe that no useful purpose would be served in granting this motion and accordingly it is denied.

Plaintiff relies on the well settled principle that except for necessaries, contracts of minors are voidable at the election of the minor. The right of a minor to elect to disaffirm his contracts is unconditional and does not depend upon the reasonableness of the contract, the ability of the minor to make restitution or whether such contract is executory or executed. The avowed purpose of the rule is the protection and safeguarding of a minor's property or funds regardless of the good faith of the person dealing with him. Both parties refer to authorities in which the rule is announced that a minor has no authority to appoint an agent, that a minor's right to disaffirm his contract is not affected by parental approval and a parent by his relationship to a minor is without authority to enter into contracts binding a minor.

Plaintiff insists that Clifford Schmidgall was acting as her agent in the purchase of the interest in the oil lease with her funds. A review of the evidence in the record reveals that although Plaintiff may have consented to the handling of her affairs by her father there is little evidence from which it can be inferred that she specifically authorized the purchase of the oil lease. Of far more significance is the lack of evidence that the amounts received by the Defendant were in fact paid from the funds of Plaintiff. Each of the payments was made from cash in the possession of Clifford Schmidgall. Although the Plaintiff testified that she had inherited money from her granparents and had received money from employment she

did not know how much money she had or where it was and in fact did not testify that any of her funds were used to purchase the oil lease. Although Clifford Schmidgall asserted that his daughter's funds were used, except for such assertion, which is unsupported by any evidence that the daughter's funds were depleted, the only inference that can be drawn from the evidence is that the payments were made from Clifford Schmidgall's personal funds.

Plaintiff claims that under the authority of Moscovitz v. Kerman Stores Co., 259 Ill. App. 480,it is immaterial whether the funds used to purchase the oil lease were hers or her father's. In our view of the Moscovitz case it not only does not support Plaintiff's contention but by implication supports a view contrary to that of Plaintiff. In Moscovitz the father gave money to his daughter to buy a trousseau. The daughter purchased the trousseau and thereafter elected to rescind the purchase. It is apparent from a reading of the case that if the father had purchased the trousseau and then given it to his daughter the daughter would have had no such right of recision. In the instant case it can be inferred that Clifford Schmidgall used his personal funds to purchase the interest in the oil lease and that the designation of his daughter's name on the contract was in accord with his intention of making a gift to her of the interest in the oil lease. It is clear in Moscovitz that the father made no purchase and that his only relation to the transaction was a gift of money to his daughter. In Fuller vs. Pool, 258 Ill. App. 513, the Court, in reaffirming a minor's right to disaffirm his contract, concluded that the minor was entitled to the restitution of payments which he had made from his own funds and the value of his property with which he had parted but was not entitled to the repayment of amounts paid by his mother, a co-obligor on a contract to purchase a car. Likewise in Lewellyn vs. Hawkins, 253 Ill. App. 368, a minor was held to be entitled to repayment where funds standing in his name in a bank account were used by his mother and the person with whom she dealt knew the funds belonged to the minor.

In the instant case the evidence fails to establish that funds received by Defendant were those of Plaintiff but on the contrary supports the conclusion

that the interest in the oil lease was a gift from her father and hence she had no right of recision.

We also believe that the court did not err in failing to enter judgment against Pursley, the defaulted Defendant. There is nothing in Plaintiff's cause of action or the evidence adduced in support thereof from which it can be concluded that her rights against Pursley were any different than those asserted against Engelke. It follows that if she is not entitled to recover from Engelke she likewise is not entitled to recover from Pursley. For the foregoing reasons the judgment of the Circuit Court of Peoria County is affirmed.

JUDGMENT AFFIRMED.

Alloy, J., and
Corny, J. concur.

filed 3-9-67

81 I.A.2 111

IN THE

APPELLATE COURT OF ILLINOIS,

THIRD DISTRICT.

ROY W. HUGHES, Et al.,	)	Abstract
Plaintiffs-Appellants,	)	
vs.	)	No. 66-44
CITY OF PEORIA, Et al.,	)	
Defendants-Appellees.	)	

HOFFMAN, J.

This is a companion case to Hughes v. City of Peoria, No. 66-17. As in that case, the complaint here was for a declaratory judgment attacking the validity of a Peoria ordinance changing the zoning classification of approximately 32 acres of land to permit a new shopping center. The legal issues are the same in both cases. This appeal is from an order dismissing the complaint upon defendants' motion for summary judgment, and our holding here will follow that in No. 66-17, in which our opinion is filed this day.

In the instant case, as in the former, plaintiffs allege that the zoning re-classification will have a "destructive effect" upon their properties and businesses, that their businesses and properties "will be greatly depressed and depreciated in value" etc. And, as in the former case, defendants here specifically denied these allegations of special damage.

In the instant case, as in the former, the affidavits and attached exhibits do not overcome the issues created by the pleadings.

Accordingly, we find that the court below erred in its finding that "no genuine issue of fact exists", and we remand this cause to the Circuit Court of Peoria County for further proceedings in accordance with the views expressed in our opinion in Hughes v. City of Peoria, No. 66-17, filed this date.

Reversed and Remanded.

Publish abstract only

51071

RUTH KRITZBERG,	)	
	)	
Plaintiff-Appellee,	)	APPEAL FROM THE CIRCUIT
	)	
v.	)	COURT OF COOK COUNTY,
	)	
MARTIN KRITZBERG,	)	ILLINOIS.
	)	
Defendant-Appellant.	)	

MR. PRESIDING JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order denying defendant's petition to vacate a decree of divorce.

On January 20, 1964, a complaint for divorce was filed by the plaintiff and an answer and counter-complaint for divorce was filed by the defendant on February 10, 1964. A stipulation was thereafter filed by counsel of record for the parties to set the matter for an uncontested hearing.

On March 19, 1965, the plaintiff proved her case at an uncontested hearing. At that time she testified that she had entered into an oral agreement with the defendant as to a settlement of property rights and custody of the children.

On April 21, 1965, the defendant sought to discharge his attorney, Richard Altieri, and the law firm of Whitcup & Fiala served a notice upon Richard Altieri and Joseph H. and Norman Becker, attorneys for plaintiff, notifying them that they would appear on April 27, 1965, and ask leave of court to be substituted as attorneys of record for the defendant, and further, to have the cause set as a contested matter. On April 27, 1965, a hearing was held by the court which included the oral testimony of witnesses, the admission of documentary evidence and argument of counsel. During this hearing Whitcup & Fiala appeared and argued at length before the court, examined witnesses, and examined evidence

notwithstanding no appearance had been entered by them. Altieri, who had been notified by his client that he was being discharged on April 21, 1965, was also present at the hearing on April 27, 1965, and it is claimed by the defendant that it was error to permit Altieri to participate in the hearing on April 27. However, notice was served upon Altieri by the defendant to appear on that date. All of the foregoing appears in defendant's petition to vacate the decree of divorce.

The court, after the hearing on April 27, 1965, denied defendant's motion and on April 29, 1965, a decree of divorce was entered.

On May 26, 1965, a petition to vacate the divorce decree was filed by the defendant by attorneys Whitcup and Fiala, and an answer to said petition was filed by the plaintiff on August 26, 1965. On August 19, 1965, Richard Altieri filed an answer to the petition to vacate the decree, because he had been mentioned in the petition to vacate.

On October 18, 1965, an order was entered which recited that the matter came on to be heard upon the petition of the defendant to vacate the divorce decree, and plaintiff's answer thereto; that the parties were present in open court and represented by their respective attorneys of record, and "the court having heard the sworn testimony of the parties and adduced the evidence and being advised in the premises, and having jurisdiction," ordered that the petition of the defendant to vacate the decree of divorce be denied.

At the hearing on the petition to vacate, testimony was heard, exhibits were offered in evidence and arguments were made by counsel. However, the record before us contains

no report of proceedings of the hearing held on April 27, 1965, nor of the hearing conducted on the petition to vacate the divorce decree and the answers thereto, which culminated in the order of October 18, 1965, in which the court denied the defendant's petition to vacate the decree of divorce.

The main contention of the defendant in this case is that there was no agreement made with his wife as to property settlement or custody of the children, although the wife, while testifying at the time of the hearing of the divorce case, had testified that the defendant and the plaintiff had entered into an oral agreement, which was testified to at some length by plaintiff.

The plaintiff contends that, since there is no report of proceedings of the hearing held on April 27, 1965, and since there is in the record on appeal no report of proceedings pertaining to the hearing on the petition to vacate the decree, the decisions of the trial court must be affirmed.

On January 7, 1966, the appellant filed a short record in this court, and on January 11, 1966, appellant filed a motion in this court for leave to file the record on appeal, wherein he represented to this court as follows:

> "Appellant does not desire to file any Report of Proceedings and wishes to prosecute the appeal herein on the common law record only without any Report of Proceedings."

It is a well established rule of law that where no report of proceedings is incorporated in the record on appeal the presumption is that there was sufficient evidence to sustain the decision of the trial court. Skaggs v. Junis, 28 Ill. 2d 199, 190 N.E.2d 731; People v. Kapande, 23 Ill. 2d 230, 177 N.E.2d 825; Leathers v. Leathers, 13 Ill. 2d 348, 148 N.E.2d 773;

Anthony v. Gilbrath, 396 Ill. 125, 71 N.E.2d 84; Pease v. Kendall, 391 Ill. 193, 63 N.E.2d 2; Sauter v. Pickrum, 373 Ill. 541, 26 N.E.2d 844. The same rule of law has been adhered to repeatedly in this court. Kay v. Kay, 46 Ill. App. 2d 446, 197 N.E.2d 121, and numerous other cases.

In the Kay case the plaintiff contended that his counsel exceeded his authority. The court there found that there was no report of the proceedings regarding the hearing on that matter, and said on page 451:

> "It must be presumed from the order that the chancellor heard adequate evidence or received sufficient information to sustain the decision he made resolving the issue against the plaintiff. Smith v. Smith, 36 Ill App2d 55, 183 NE2d 559. It must be presumed that the chancellor was satisfied that the attorney had not exceeded his authority, for the finding of December 17th, including the stipulation and the property settlement, was not set aside."

In Werbeck v. Werbeck, 70 Ill. App. 2d 279, 281, 217 N.E.2d 502, the court said:

> "There is no transcript of the proceedings which took place on December 8, 1964, when the court ordered the defendant to pay $330 attorney's fees. The order states that the court heard testimony before making its finding. In the absence of the report of this testimony there is a presumption that the testimony justified the order. (cases cited) The order of December 8th must, therefore, be affirmed."

In the petition to vacate the divorce decree the defendant in paragraph 23 stated:

> "That an alleged written agreement signed by the Defendant, Counter Plaintiff was admitted into evidence by the said Richard Altieri in support of his examination of the defendant, Counter Plaintiff, notwithstanding he was still the counsel of record of Defendant, Counter Plaintiff."

In plaintiff's answer to the petition to vacate the decree she alleged, "That she denies the allegations in Paragraph Twenty-three (23) and states that a Memorandum of Direction to attorney

Richard Altieri from the defendant was introduced into evidence and further states as the attorney of record he had a right to do so." Further, in the petition to vacate the defendant alleged that Richard Altieri introduced three exhibits, none of which are made a part of the record before us. No doubt one of these exhibits was the Memorandum of Direction to attorney Richard Altieri from the defendant advising Altieri as to what the defendant would agree to with regard to the settlement of property rights and custody of the children. Without these records and without the oral testimony that was introduced at the hearing, this court must assume that the orders entered pursuant to said hearing were justified by evidence.

The orders of the trial court entered on April 27, 1965, and on October 18, 1965, are affirmed.

Affirmed.

Schwartz and Dempsey, JJ., concur.

Abstract pnly.

NO. 66-79

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

JANE E. DE BIASE; DONALD T. DE BIASE; DONNA JANE DE BIASE, MICHAEL J. DE BIASE, minors, by their father and next friend, DONALD T. DE BIASE, Plaintiffs-Appellees, vs. DONALD D. MOZA, Defendant-Appellant.	Appeal from the Circuit Court of DuPage County.

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

In the late afternoon of September 1, 1962, the plaintiff, Jane E. De Biase, was traveling West on Lake Street near the intersection of Roselle Road in Bloomingdale, Illinois. She was driving her husband's automobile and her two minor children, Donna Jane and Michael, were riding with her. Mr. De Biase is a part-time interior decorator and the vehicle contained many cans of paint. Mrs. De Biase stopped near the intersection and was struck from behind by the defendant, Donald D. Moza. The De Biase vehicle suffered substantial damage, a considerable amount of paint and materials was destroyed and the children suffered minor injuries.

Mrs. De Biase was pregnant at the time and when she subsequently gave birth to her child, she suffered more pain than she had in giving birth to the two children injured in the accident. Medical testimony indicated that she suffered a hyperextension-

hyperflexion injury to the cervical and lumbar spine. In addition, there was a narrowing of the space between the vertebrae and an aggravation of a congenital condition in the lumbar spine. Her doctor testified that she might have to have a spinal fusion operation as a result of the accident.

The defendant conceded liability and the case went to the jury on the question of damages only. The jury returned a verdict in favor of Jane De Biase in the sum of $8,500.00, Michael De Biase in the sum of $500.00, Donna Jane De Biase in the sum of $750.00 and Donald T. De Biase, the husband, in the sum of $1,000.00 for his property damage. The trial court denied the defendant's post trial motion and this appeal followed.

The defendant raises two issues in this Court. He first complains about improper remarks of plaintiff's counsel and secondly, he suggests that the verdict is grossly excessive.

Since liability had been admitted there was no occasion for the court or counsel to go into the facts of the accident other than a simple statement of the basic facts; however, in his opening remarks, plaintiff's counsel told the jury "The evidence will show that at the time Mr. Moza struck this car, Mr. Moza was so intoxicated ----." At this point the court sustained an objection to the remarks and counsel did not proceed; thereafter, the court denied a motion for a mistrial at this stage. Later during direct examination plaintiff's counsel asked a police officer if there was anything else he could say about the accident and the officer replied "Quite a bit." Objection to this answer was sustained by the trial court. Finally, during the closing argument, plaintiff's counsel told the jury "They didn't do this, they didn't cause this, that man caused it. I only wish you knew the circumstances under which he did it." Objection was sustained and the jury was instructed to disregard the remark. In addition, counsel was cautioned by the trial court.

It is to be noted that the trial court considered the matter during the trial and again in connection with the post trial motion. The trial court did not believe that prejudice resulted to the defendant and therefore did not grant either a mistrial or a new trial. Great weight is given to the trial court's discretion in matters such as this.

Plaintiff's counsel is an experienced trial lawyer. He knew or should have known that his remarks were inappropriate in view of the limited nature of the issues presented to the jury. Counsel is reminded that he should not permit his zeal in promoting a client's cause to becloud his responsibility as an officer of the court. His remarks border on reversible error.

We have examined the entire record and find that the trial judge did not abuse his discretion in denying defendant's motions.

> "In summation of an argument to a jury the widest latitude consistent with precedents and a reasonable interpretation of the record, and consistent with decorum, is given counsel, and control and regulation of such argument, unless there is a flagrant abuse, rests in the sound discretion of the trial court."

Oller v Scherer Freight Lines, Inc., 30 Ill. App. 2d 282 (1961).

The defendant urges us to accept the cases of Jacobson v National Dairy Products Corp., 32 Ill. App. 2d 37 (1961) and Jarvis v Hall, 3 Ohio App. 2d 321, 210 N. E. 2d 414 (1964), as authority for the proposition that counsel's remarks were prejudicial in this case. Here counsel's remarks were not as extreme as in the cases cited by defendant and we cannot find that the trial court abused its discretion in failing to find misconduct.

The excessiveness of a jury verdict in a personal injury case has always presented a difficult problem at the Appellate level. On a previous occasion we noted that the amount of money which is appropriate to fairly compensate an injured plaintiff entitled to verdict is a matter uniquely determinable by a jury and not by the court. Rogers v Gehrke 77 Ill. App. 2d 343, 222

N. E. 2d 351 (1966). This is particularly true in an injury case where the jury must weigh the proper amount to be given for such items as pain and suffering. An Appellate tribunal is not permitted and should not stand in the shoes of the jury. We can only intervene if the jury's verdict is so grossly excessive as to evidence passion or prejudice. Lau v West Towns Bus Co., 16 Ill. 2d 442 (1959). One of the great benefits of the jury system is that it applies the common sense of twelve individuals to the calculation of that amount of money which will fairly compensate someone who is injured and entitled to recovery.

The object of the review of this judgment is not to determine whether the record is free from error, but rather to ascertain whether a just conclusion has been reached, founded upon competent and sufficient evidence, in a trial in which such error as may have occurred was not prejudicial to the defendant's rights. Kosowski v McDonald Elevator Co., 33 Ill. App. 2d 386, 397 (1962); Johnson v Chicago & N. W. Ry. Co., 9 Ill. App. 2d 340, 358 (1956).

After an examination of the record as a whole we cannot fairly say that the errors complained of were prejudicial to the rights of the defendant, or that the jury verdict is so excessive as to evidence passion or prejudice. The trial judge was correct in denying defendant's post trial motion.

JUDGMENT AFFIRMED.

Davis, P. J., and Abrahamson, J., concur.

Filed 4-15-67

81 I.A.2 251

NO. 66-124

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

WILLIAM VANOVER and VOVA VANOVER, Plaintiffs-Appellants, vs. CLYDE KREHER, Defendant-Appellee, BERT KREHER, Third Party Plaintiff-Appellee, vs. WILLIAM VANOVER, Third Party Defendant-Appellant.	Appeal from the Circuit Court of St. Clair County. Honorable John M. Karns, Judge Presiding.

Goldenhersh, J.

Plaintiffs filed suit to recover damages for personal injuries suffered when an automobile driven by plaintiff, William Vanover, and in which plaintiff, Vova Vanover, was riding as a passenger, collided with a truck driven by defendant, Clyde Kreher. Bert Kreher, riding in the truck with defendant, Clyde Kreher, was given leave to intervene and filed a "complaint in intervention" naming plaintiff, William Vanover, as counter-defendant, seeking to recover for personal injuries which he suffered in the collision. The case was tried to a jury which returned verdicts in favor of the defendant, Clyde Kreher, on the claims of the plaintiffs, and a verdict in the amount of $5,000.00 in favor of the counter-plaintiff, Bert Kreher, on his claim against defendant, William Vanover. Judgments were entered on the verdicts, a post trial motion was denied, and this appeal followed. Plaintiffs appeal from the judgments entered

in favor of defendant on their causes of action, and plaintiff, William Vanover, appeals from the judgment entered against him in favor of the intervening plaintiff, Bert Kreher.

The evidence shows that on the morning of September 3, 1964, Clyde Kreher, accompanied by his brother, Bert Kreher, was driving a pickup truck north on Route 159. Route 159 is a paved two lane highway and in the vicinity of the occurrence in question, is straight and level. Defendant testified that he and his brother, who engage in farming as partners, were on their way to their father's farm to obtain a part for a piece of farm machinery. To reach their father's farm they intended to make a left turn onto Schoolhouse Road, a gravel road 16 feet in width which comes into Route 159 from the west.

Defendant testified that when he was 250 feet south of Schoolhouse Road he looked in his rear view mirror and saw plaintiffs' car a quarter mile behind his vehicle. Defendant was driving at a speed of 45 miles per hour, he turned on his left turn signal and put his arm out the window. When he reached Schoolhouse Road he made a 90° left turn. He did not remember whether he looked to the rear again between the time he first saw plaintiffs' car and the time when he made the turn. At the time of making the turn, the truck was traveling 10 to 15 miles per hour.

Plaintiff, William Vanover, testified that he was driving north on Route 159, at 50 to 55 miles per hour, when he saw defendant's truck a quarter mile ahead of him. The truck was moving somewhat slower than his car. When his vehicle was 55 to 60 feet behind the truck, he turned out into the southbound lane of travel to pass, and "just as I got up to him, he turned left in front of me".

At no time did he see a directional signal, brake lights, or an arm signal.

A State Patrolman, called by plaintiffs, testified that when he arrived at the scene he found the Kreher truck overturned in a ditch north of Schoolhouse Road. He did not recall the position of the plaintiffs' car. There were skid marks which he stated were made by plaintiffs' car, the left mark being 48 feet in length, the right, which he did not measure being somewhat shorter. The skid marks extended in a northwesterly direction and were entirely in the southbound lane. The right skid mark started on the center line but did not extend into the northbound lane.

The weather was clear, and the road was dry. There are no signs on Route 159 to indicate the presence of Schoolhouse Road. It is admitted that defendant and his brother were engaged in a joint venture at the time of the occurrence.

Plaintiffs contend that the trial court erred in refusing to give an instruction tendered by plaintiffs, erred further in giving 4 instructions tendered by defendant and the intervening plaintiff, and the verdicts are against the manifest weight of the evidence.

Upon defendant's objection, the court refused plaintiffs' instruction No. 7, drawn in the form of I.P.I. 10.04. The court gave another instruction (I.P.I. 70.01) tendered by plaintiffs. This instruction adequately informed the jury as to the duty of the drivers, and the refusal of plaintiffs' instruction No. 7 was not error.

Plaintiffs argue that the court erred in giving the intervening plaintiff's instruction No. 1 which in the form of

I.P.I. 60.01, set forth, verbatim, section 61(a) of the Uniform Act Regulating Traffic on Highways (Ch. 95½, sec. 158(a) Ill. Rev. Stat. 1965) and intervening plaintiff's instruction No. 2 which, in the same form, paraphrased section 58(b)(2) (Ch. 95½, sec. 155(b)(2), Ill. Rev. Stat. 1965). As to the first instruction, plaintiffs contend that there is no evidence that plaintiff, William Vanover, was following the defendant's vehicle too closely. As to the second instruction, plaintiffs argue that the last paragraph, which appears in both instructions[1], was prejudicial to plaintiff, Vova Vanover, because, as a passenger, she could not have been in violation of the statute.

As to the latter contention, the court gave instructions in the form of I.P.I 41.01 and 72.03, and we fail to see how the paragraph of which plaintiffs complain could have been prejudicial to plaintiffs or could have misled the jury.

With regard to plaintiffs' objections to the instruction which informed the jury of the provisions of Ch. 95½, sec. 158(a), we agree with the plaintiffs that there is no evidence to indicate that the collision resulted from plaintiffs' vehicle following too closely behind defendant's truck. However, this case presented a simple factual situation; the jury could believe either plaintiffs' version, or defendant's version, of what occurred. In Berg v. Collier, 60 Ill. App. 2d 145, this court, in discussing the refusal to give an instruction which included the provisions of Ch. 95½, section 146(a), Ill. Rev. Stat., said at page 152: "To conclude

[1]"If you decide that a party violated the statute on the occasion in question, then you may consider that fact, together with all the other facts and circumstances in evidence in determining whether or not a party was negligent before and at the time of the occurrence."

that a jury would be misled by the inclusion of the reference to maximum speed limits unrealistically attributes to jurors a degree of naivete incongruous with the motorized age in which we live."

We believe this comment to be appropriate to the situation here presented. We fail to see in what manner the giving of the instruction could have prejudiced the plaintiffs, and although there is no evidentiary basis therefor, the error does not warrant reversal.

Plaintiffs contend that the court erred in giving two instructions containing the word "intersection" without defining it. The term is commonly used and failing to define it was not error.

Plaintiffs contend that because defendant, Clyde Kreher, and the intervening plaintiff, Bert Kreher, were admittedly engaged in a joint enterprise, the court erred in giving an instruction tendered by the intervening plaintiff, in the form of I.P.I. 41.05. An instruction tendered by plaintiff, William Vanover, correctly instructed the jury that any negligence of defendant was imputable to the intervening plaintiff, and as above stated, an instruction was given for plaintiff, Vova Vanover, in the language of I.P.I. 72.03. Considering the instructions as a whole, we cannot say that they contain error prejudicial to either plaintiff.

Finally, with regard to plaintiffs' contention that the verdicts are against the manifest weight of the evidence, this court, in Brayfield v. Johnson, 62 Ill. App. 2d 59, at page 63, said: "A court of review can set aside a verdict as being against the manifest weight of the evidence only when it is obvious or clearly evident that the jurors have arrived at an incorrect result.

Romines v. Illinois Motor Freight, Inc., 21 Ill. App. 2d 380, 158 N. E. 2d 97 (1959). It is for the jury alone to determine the credibility of witnesses and the weight of the evidence on controverted questions of fact. A verdict based on conflicting evidence and approved by the trial judge should not be disturbed on appeal unless contrary to the manifest weight of the evidence; that is, an opposite conclusion must be clearly evident. Ritter v. Hatteberg, 14 Ill. App. 2d 548, 145 N. E. 2d 119, (1957). Manifest means clearly evident, clear, plain, indisputable. Schneiderman v. Interstate Transit Lines, Inc., 331 Ill. App. 143, 72 N. E. 2d 705 (1947)."

Applying this test to this record, we cannot substitute our judgment for that of the jurors who returned the verdicts and the trial court who refused to set them aside.

For the reasons herein set forth, the judgments of the Circuit Court of St. Clair County are affirmed.

Judgments Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

81 I.A.2 262

NO. 66-122

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. JAMES E. HANOVER, Defendant-Appellant.	)	Appeal from the Circuit Court of Jackson County. Honorable Peyton H. Kunce, Trial Judge.

Goldenhersh, J.

In a complaint filed in the Circuit Court of Jackson County, defendant was charged with the offense of obtaining lodging without paying therefor, with intent to defraud (Ch. 78, sec. 4(a), Ill. Rev. Stat. 1965). Defendant entered a plea of guilty and was sentenced to one year in the Illinois State Farm at Vandalia. This court allowed defendant's petition for leave to appeal, filed pro se, and appointed counsel to assist defendant in this appeal.

Defendant contends that the circuit court erred in failing to appoint counsel as required by Ch. 38, sec. 113-3(a), Ill. Rev. Stat. 1965. The People contend that the defendant, after being advised by the court of his right to counsel, knowingly and understandingly waived appointment of counsel, and pleaded guilty to the charge.

In a comprehensive brief evidencing a thorough study of the authorities pertinent to the right of a defendant charged with a misdemeanor to the assistance of counsel, and the corollary question of whether, and in what manner, the right to counsel may be waived, appointed counsel has reviewed the decisions of this, and other jurisdictions. However, an examination of the transcript

of the proceedings in the circuit court leads us to conclude that the defendant, no stranger to criminal proceedings, was fully advised of his rights, and knowingly and understandingly waived the services of counsel, and with full knowledge of the consequences of a plea of guilty and of the statutory range of penalty, pleaded guilty to the charge.

The judgment of the Circuit Court of Jackson County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

81 I.A.2 263

No. 66-33

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

THE PEOPLE OF THE STATE OF ILLINOIS, Appellee, -vs- DANNY THOMPSON, Appellant.	Appeal from the Second Judicial Circuit Hamilton, County, Illinois Honorable William G. Eovaldi, Judge Presiding.

George J. Moran, P.J.

This is an appeal from a judgment of the Circuit Court of Hamilton County, Illinois, sentencing the defendant to the State penitentiary for an indeterminate term of not less than seven, nor more than fifteen years.

The defendant was indicted by a grand jury on eighteen separate counts of burglary, one of which was the offense for which the defendant was found guilty and sentenced.

The evidence produced by the State indicates that on April 3, 1965, the defendant, Robert Mezo, and Jimmy Perez, who were indicted at the same time as defendant, burglarized the Beaver Creek Community Consolidated School District. The defendant's defense was that he was intoxicated to such an extent that he was incapable of having the requisite intent to commit burglary. Due to the numerous allegations of error, additional facts will be presented in the consideration of each allegation.

The defendant first contends that he was denied a fair trial because females were excluded from the grand jury which returned indictments against him and because females have been systematically excluded from grand juries since 1963. However, the defendant did not offer any evidence to indicate that females were intentionally excluded. In fact, the defendant's only witness specifically denied that females were intentionally omitted.

In People v. Peters, 382 Ill 549, at 554, our Supreme Court held that, "there being no showing of collusion, conspiracy or lack of good faith . . .

to keep women off the grand jury, the defendants were not prejudiced by the proceedings." In this case, the mere fact that there were no female members on the grand jury which indicted the defendant, absent a showing of intentional exclusion, does not indicate that the defendant did not receive a fair trial.

The defendant next contends that the indictment was fatally defective because the State's Attorney signed at the conclusion of the charging portion and the foreman of the grand jury signed on the back under the words " A TRUE BILL," citing Ill. Rev. Stat. Ch. 38, Sec. 111-3(b). This identical contention was decided adversely to the defendants in People v. Faciano, 66 Ill App 2d 431, and in People v. Vlcek, 68 Ill App 2d 178. We agree with these cases.

The defendant next contends that the indictment did not state the time and place of the offense as definitely as could have been done and that it did not state the statutory provision alleged to have been violated, as required by Ill. Rev. Stat. Ch. 38, Sec. 111-3(4) and (2). The indictment states that on April 3, 1965, Danny Thompson "committed the offense of BURGLARY in that (he) without authority, knowingly entered into a building of the Beaver Community Consolidated School District Number 106 of Hamilton County, Illinois . . . in violation of Paragraph 19-1, Chapter 38, Illinois Revised Statutes." The defendant argues that the indictment should have included the approximate hour and exact location of the crime alleged, citing the Appellate Court opinion in People v. Blanchett, 55 Ill App 2d 141. However, our Supreme Court reversed this decision on the same issue for which the defendant cites it. People v. Blanchett, 33 Ill 2d 527. He also argues that the indictment should have cited Ill. Rev. Stat. Ch. 38, Sec. 19-1(a), instead of Sec. 19-1. However, we believe that the indictment sufficiently notified the defendant of the precise offense with which he was charged. People v. Blanchett, 33 Ill 2d 527, at 532.

The defendant next contends that his written confession should not have been admitted into evidence because, contrary to Ill. Rev. Stat., Ch. 38, Section 114-10(a), he was not given a complete list of the witnesses to the confession. Section 114-10 provides that:

> (a) On motion of defendant in any criminal case made prior to trial the court shall order the State to furnish the defendant with a copy of any written confession made to any law enforcement officer of this State or any other State and a list of the witnesses to its making and acknowledgement. If the defendant has made an oral confession a list of the witnesses to its making shall be furnished.
>
> . . .
>
> (c) No such confession shall be received in evidence which has not been furnished in compliance with subsection (a) of this Section. . . .

After a motion by defendant, the State furnished a Bill of Particulars, which included a copy of the confession and a list of the persons who witnessed the confession. However, it developed at the trial that there were other persons who witnessed the confessions, but whose names were not listed -- Robert Mezo and Jimmy Perez, who had already pleaded guilty to the charge, and the State's Attorney. Mezo and Perez testified at the trial, but only Mezo mentioned the defendant's confession. And he did so only after a question by the defendant's counsel, attempting to impeach his testimony by use of the defendant's confession. It further appeared that the State's Attorney was present at the time the witnesses were signing the confession, but not earlier. He did not testify.

Under these circumstances, we do not believe it was error to admit the written confession.

The defendant next contends that it was error for the People to fail to furnish to him copies of the confessions of Mezo and Perez and a list of witnesses thereto. He argues that, since the defendant, Mezo, and Perez were present and assisted each other in preparing each one's confession, the confessions of Mezo and Perez constituted the defendant's confession and should have been provided to the defendant, pursuant to Ill. Rev. Stat., Ch. 38, Section 114-10, supra. The defendant cites four cases in support of this contention. These cases merely hold that, "When an incriminating extra-judicial statement of a third person is admitted to be true by the accused, the statement by adoption becomes his own and is admissible in evidence at his trial." People v. Hanson,

31 Ill 2d 31, at 38. In the present case, there was no attempt to admit the confessions of Mezo and Perez. Furthermore, there was no showing that the defendant admitted that the statements contained therein were true. In view of the facts in this case, it was not error for the People to fail to furnish to him copies of the confessions of Mezo and Perez.

The defendant next contends that the trial court erred in admitting the testimony of two police officers concerning the defendant's oral confession. He argues (1) that the State had certified in its Bill of Particulars that "no oral confession was made pertaining to the above cause," and (2) that the State failed to furnish the defendant with a list of witnesses to the oral confession.

The record discloses that the State did certify that there was no confession and that it failed to provide a list of witnesses to the confession. According to Ill. Rev. Stat. Ch. 38, Sec. 114-10, testimony concerning the confession should not have been admitted. However, in addition to the detailed testimony of the defendant's accomplices, the State introduced the defendant's written confession. In response to questions from his counsel, the defendant, himself, testified that he had signed the written statement, that he had tried to cooperate with the Sheriff and State police at all times, and that he had told them everything he knew. Since the oral statement did not differ from the written statement and since the guilt of the defendant was established by other competent evidence, we do not believe the admission of the oral confession justifies a reversal of the judgment. People v. Pelkola, 19 Ill 2d 156.

The defendant next contends that the trial court erred in refusing to grant a change of place of trial. He argues that Hamilton County is a small, rural county, that he was indicted for the burglary of more than twenty separate business establishments within the county, and that he was thereby unable to receive a fair trial. The granting of a change of place of trial on account of the prejudice of the inhabitants of the county rests in the sound discretion of the trial court. People v. Allen, 413 Ill 69. In the present case, the defendant failed to produce any witnesses to testify concerning the prejudice of the community.

Further, the witnesses produced by the State all testified that they thought the defendant would receive a fair trial. Therefore, there is no indication that the trial court abused its discretion.

The defendant next contends that the trial court erred in refusing to allow his attorney to propound certain questions to the veniremen during the voir dire examination. The defense sought, for example, to ask the following questions:

> Of course, you know a man is presumed innocent until he is proved guilty beyond a reasonable doubt? If the prosecution fails to prove the guilt of the accused with that degree of moral certainty that amounts to proof beyond a reasonable doubt, then would you vote not guilty? Would you require the accused at any time to satisfy you as to his innocence? Would the fact that you were in the minority influence your vote at all? Do you realize that you are bound to reach a verdict solely on the evidence introduced during the trial? You understand that the comments of the prosecution are not evidence in this case?

Illinois Revised Statutes, Ch. 110, Sec. 101.24-1, provides that the judge shall initiate the voir dire examination and shall briefly outline the nature of the case. The judge shall then put to the jurors any questions which he thinks necessary, touching their qualifications to serve as jurors in the cause on trial. The parties or their attorneys shall be allowed a reasonable opportunity to supplement such examination, but shall not directly or indirectly examine jurors concerning matters of law or instructions.

We believe that the questions which the defense sought to ask were essentially attempts to examine the jurors concerning matters of law or instructions and that it was within the discretion of the trial court to refuse them. People v. Lobb, 17 Ill 2d 287.

The defendant next contends that the trial court erred in refusing to allow him to question one of the State's witnesses, Trooper Irvin, concerning his testimony before the grand jury. The defendant made an offer of proof to the court, indicating that he desired to ask Trooper Irvin if he had testified before the grand jury in order to lay a proper foundation for the production of Irvin's testimony before the grand jury. He stated that he sought to impeach Trooper Irvin's

testimony at trial by his former testimony. Irvin testified only that the defendant had made the written and oral confession previously referred to in this opinion. Since the defendant admitted making the written confession and since the oral confession was substantially the same as the written confession, we do not see what purpose could have been served by impeaching Irvin's testimony. Under these circumstances we do not believe the ruling of the trial court on this point was reversible error.

The defendant next argues that the court erred in refusing to give Defendant's Instructions Nos. 5, 6, 13, and 15. However, all of the instructions given by the trial court should be considered together and, if they fairly state the law of the case, they are sufficient. People v. Witte, 350 Ill 558; Johnson v. Jackson, 43 Ill App 2d 251. Furthermore, where no prejudice has been shown, the refusal to give an instruction cannot be deemed reversible error. Kortlander v. Chicago Transit Authority, 56 Ill App 2d 48.

In the present case we believe that the jury was adequately instructed on the law of the case. Defendant's Instructions Nos. 5 and 6 were covered by Defendant's Instruction No. 16, and Defendant's Instructions Nos. 13 and 15 were quite adequately covered by Defendant's Instructions Nos. 14 and 17.

The defendant finally contends that the sentence of the trial court was excessive and should be reduced. In People v. Nordstrom, 73 Ill App 2d 168, the court held that "the power to reduce a sentence is one that is to be exercised with caution. The imposition of sentence is peculiarly within the discretion of the trial court. This discretion should not be interfered with unless clearly abused." People v. Stevens, 68 Ill App 2d 265.

In the Hearing on Mitigation and Aggravation, the court heard the testimony of the witnesses. It heard the defendant's testimony that he had committed nineteen burglaries, for which he had been indicted. Under the circumstances, we do not believe that the trial court clearly abused its discretion in sentencing the defendant to the State penitentiary for an indeterminate sentence of not less than seven nor more than fifteen years.

For the foregoing reasons the judgment of the Circuit Court of Hamilton County is affirmed.

Judgment affirmed.

CONCUR:

Honorable Edward C. Eberspacher

Honorable Joseph H. Goldenhersh

PUBLISH ABSTRACT ONLY.

NO. 66-93

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

CENTRAL ILLINOIS PUBLIC SERVICE COMPANY, Petitioner-Appellant, vs. ROSS S. MONTGOMERY, MARIE MONTGOMERY, WILLIE DOETCH, LOUISE DOETCH, S. L. KIMMEL, JULIA P. KIMMEL, OVAL HENDERSON, MIMA HENDERSON, DAVID ALLEN COBB, FRANCES LEA COBB, UNITED STATES OF AMERICA, Acting Through the FARMER'S HOME ADMINISTRATION, UNITED STATES DEPARTMENT OF AGRICULTURE, SOUTHERN ILLINOIS POWER CO-OPERATIVE, LEE NORRIS, DORENE NORRIS, THE FEDERAL LAND BANK OF ST. LOUIS, EUGENE STONE, NADINE STONE and SOUTHEASTERN ILLINOIS ELECTRIC COOPERATIVE, INC., Defendants-Appellees, and UNITED STATES OF AMERICA, Intervener-Appellee.	Appeal from the Circuit Court of Williamson County. Honorable John H. Clayton, Trial Judge.

Goldenhersh, J.

Petitioner, Central Illinois Public Service Company, appeals from the judgments of the Circuit Court of Williamson County entered following a non-jury trial in an eminent domain proceeding wherein petitioner seeks to condemn lands of the defendants to be used in the construction of an electric transmission line.

Petitioner is a public utility corporation engaged in the business of generating, transmitting and selling electricity. The Illinois Commerce Commission has granted petitioner a certificate of public convenience and necessity to construct, operate and maintain a transmission line which will transmit 161,000 volts

of electricity from an electric generating station at Joppa to a substation at Marion, thence to an existing 138,000 volt line operated by petitioner. It will be supported by Type A structures, except at points where the line changes direction, and at those points a Type B structure will be used.

A Type A structure consists of 2 vertical columns, made of latticed steel, each 2 feet square and spaced 20 feet apart. There is a cross-arm 40 feet long at the top of the columns, also made of latticed galvanized steel. The cross-arm is 2 feet square at the point of attachment to the columns, and tapers to 6 inches square at the ends. The conductors transmitting electrical energy are suspended from the cross-arms by insulator strings 5 feet 9 inches long, one at the middle and one at each end of the cross-arm. There will be a shield wire at the top of each column to protect the electrical conductors from lightning, and provide longitudinal strength to the structures. Near the top of the structure, but below the electrical conductors, there will be a steel X-brace. All Type A structures are identical except that some are 72 feet, while others are 58 feet, in height.

The Type A structures have been designed and tested to have a longitudinal strength of 5000 pounds applied to the top of each column with no other wires in place, and a longitudinal strength of 5000 pounds applied at any of the 3 conductor attachments. The line is constructed to withstand a 100 mile per hour wind with no ice on the conductors, a 57 mile per hour wind with a coating of 1/2 inch of ice on the conductors, and a 1 inch thickness of ice on the conductors with no wind blowing.

The Type B structure consists of 3 columns similar to those

used in the Type A structure, each 30 feet apart. The shield wire will be attached to the top of 2 of these columns. The attachments for the insulators supporting the conductors will be 9 feet 2 inches below the tops of the columns. There will be guys extending from the attachment of the insulators to the ground at an angle of 45 degrees, a guy from the top of one of the columns, and each guy will extend to an anchor. There will be no cross-arms on the Type B structures. The Type B structures are 58 feet in height.

The columns of both types of structures will be supported by concrete foundations. These will be constructed by drilling a hole 42 inches in diameter, 10 feet deep. The base of the column will then be supported in the hole while the hole is filled with concrete. For the anchors, a 42 inch hole, 10 feet deep, will be drilled, and a pair of anchor rods, 2 feet apart, will be placed in the hole at a 45 degree angle. The hole will be filled with concrete to a depth of 5 feet, the remaining 5 feet will be filled with earth and tamped. Each conductor consists of 30 aluminum strands and 7 aluminum alloy strands, resulting in a cable 1.165 inches in diameter with a breaking strength rated at 23,381 pounds, and weighing .9616 pounds per foot. The shield wires consist of strands of alumoweld, described as aluminum coated to prevent rusting.

Over rural roads and across fields, a minimum clearance of 23.75 feet will be maintained, over railroad tracks, the minimum clearance will be 33.75 feet.

Upon completion, the transmission line will be patrolled, once a month, by an airplane flying slightly above and to one side of the line. The aerial inspection will be supplemented by foot patrol, at six month intervals.

Petitioner will erect the power line in the center of a working strip, 132 feet wide. It proposes to take as much of the land as will be occupied by the Type A and Type B structures, and seeks an easement over the remainder of the working strip. The areas proposed to be taken are small, and as to the parcels involved, range from .001 to .011 of an acre. The areas in the easement strips range from 3.449 to 12.391 acres. In the exercise of its rights under the easements, petitioner agrees that it will make exclusive use only of those parts of the land that are occupied by the poles, structures, guys and anchors supporting the transmission line, and the fee owners are to retain all uses of the land not inconsistent with the easement. The judgment order grants petitioner an easement for the operation, construction, maintenance, replacement and removal of the transmission line, including the right to patrol the line, and to cut down, trim and control the growth of all trees and bushes in the working strip. The order reserves to the owners all uses of the land that do not interfere with petitioner's use thereof, and also provides that petitioner shall, within 30 days following written notice so to do, "pay to the owners or any successor in title to said parcel any and all damages properly chargeable to petitioner in any way arising subsequent to the construction of said transmission line from the operation or maintenance of said line over, upon, along and across said parcel."

The owners of each of the seven parcels filed cross-petitions seeking damages to the lands not taken. The circuit court, with respect to each parcel, awarded damages for the land taken, for damages to the strips affected by the easement, and for damages to

the lands outside the strips.

The parcel referred to as the Montgomery farm, contains 353.87 acres. There will be 3 Type A structures, each 72 feet high, the area to be taken is .003 acres, and the easement strip contains 12.391 acres. The witnesses testified that the highest and best use for the land was general farming, and there was testimony that there were several good building sites along the highway frontage, some of which could be commercial property. One witness testified that land which lies along a railroad right of way has commercial value. Petitioner's witnesses' valuations of the farm ranged from $104.00 to $175.00 per acre. Defendants' witnesses made no per acre valuation, and the range of their testimony as to the value of the entire farm ranged from $106,500.00 to $109,200.00. The testimony as to the value of the land to be taken for the structure sites ranged from 31¢ to $750.00, as to the damage to the working strip, from $371.73 to $8,000.00, and as to the damage to the land outside the strip, from nothing to $21,450.00. The court awarded $300.00 for the land taken, $3,000.00 for damages to the strip, and $5,000.00 for damages to the remainder, being in the aggregate $8,300.00.

The parcel referred to as the Doetch farm, contains 149.5 acres. There will be 2 Type A structures, each 72 feet high, the area to be taken is .002 acres, and the easement strip contains 7.022 acres. The witnesses testified that the highest and best use was general farming, the use presently being made of the land. Petitioner's witnesses' valuations of the farm ranged from $100.00 to $200.00 per acre. Defendants' witnesses made no per acre valuation, and testified the farm was worth $44,850.00. The testimony as to the value of the land to be taken for the structure sites ranged from 23¢ to $500.00, as to the damage to the working

strip, from $245.77 to $4,200.00, as to the damage to the land outside the strip, from nothing to $10,687.50. The court awarded $200.00 for the land taken, $1,000.00 for damages to the strip, and $4,500.00 for damages to the remainder, being in the aggregate $5,700.00.

The parcel referred to as the Kimmel farm, contains 208 acres. There will be 3 Type A structures, each 72 feet high, the area to be taken is .003 acres, and the easement strip contains 6.861 acres. This farm originally consisted of 282 acres. Approximately 51 acres were taken for highway purposes when Illinois State Routes 148 and 37, and Interstate Route 57, were built. Since the roads were built, the Kimmels have sold approximately 24 acres to an oil company. Petitioner's witnesses testified that the highest and best use of the remaining land is general farming, and that certain portions were suitable for rural residential purposes. Defendants' witnesses testified that the highest and best use was commercial. Petitioner's witnesses' valuations of the farm ranged from $220.00 to $250.00 per acre. Defendants' witnesses made no per acre valuation, and fixed the value of the farm at $150,000.00. The testimony as to the value of the land to be taken for the structure sites ranged from 66¢ to $900.00, as to the damage to the working strip, from $463.12 to $19,400.00, as to the damage to the land outside the strip, from nothing to $9,700.00. The court awarded $300.00 for the land taken, $4,000.00 for damages to the strip, and $4,000.00 for damages to the remainder, being in the aggregate $8,300.00.

The parcel referred to as the Henderson farm, contains 42 acres. There will be 1 Type A structure, 72 feet high, and 1 Type B

structure, 58 feet high. The transmission line changes course on this farm, at the Type B structure, from northwestwardly to northeastwardly. The area to be taken is .011 acres, and the easement strip contains 4.793 acres. Shortly before the condemnation petition was filed, 5 acres were sold to an oil company. Petitioner's witnesses testified that the highest and best use of the remaining 42 acres was for business purposes along Route 148, and the remainder to be used for rural residences and a small farm. Defendants' witnesses testified that the highest and best use was commercial. Petitioner's witnesses' valuations of the farm ranged from $450.00 to $753.00 per acre. Defendants' witnesses made no per acre valuation, and testified that the farm was worth $105,000.00. The testimony as to the value of the land to be taken for the structure sites ranged from 83¢ to $2,500.00, as to the damage to the working strip, from $754.78 to $20,000.00, as to the damage to the land outside the strip, from nothing to $38,000.00. The court awarded $500.00 for the land taken, $6,000.00 for damages to the strip, and $6,000.00 for damages to the remainder, being in the aggregate $12,500.00.

The parcel referred to as the Cobb farm, contains 78.5 acres. There will be 2 Type A structures, each 72 feet high, the area to be taken is .002 acres, and the easement strip contains 4.797 acres. The west boundary of this farm is along Interstate Route 57, in a no-access area, the southeast boundary is along Illinois State Route 37. Witnesses testified that the highest and best use of the land was for general farming, but that there were several home sites in the parcel. Petitioner's witnesses valuations of the farm ranged from $175.00 to $220.00 per acre. Defendants' witnesses

made no per acre valuation, and testified that the farm was worth $35,100.00. The testimony as to the value of the land to be taken for the structure sites ranged from 35¢ to $1,000.00, as to the damage to the working strip, from $239.85 to $4,275.00, as to the damage to the land outside the strip, from nothing to $14,087.50. The court awarded $200.00 for the land taken, $2,100.00 for damages to the strip, and $1,600.00 for damages to the remainder, being in the aggregate $3,900.00.

The parcel referred to as the Norris farm, contains 36 acres. There will be 1 Type A structure, 58 feet high, the area to be taken is .001 acres, and the easement strip contains 3.449 acres. The witnesses testified that the highest and best use was for general farming, although defendants' witnesses testified that there were desirable residential sites in this tract. Petitioner's witnesses' valuations of the farm ranged from $175.00 to $211.00 per acre. Defendants' witnesses made no per acre valuation, and testified that the farm was worth $28,800.00. The testimony as to the value of the land to be taken for the structure sites ranged from 18¢ to $250.00, as to the damage to the working strip, from $172.45 to $5,332.00, as to the damage to the land outside the strip, from nothing to $12,800.00. The court awarded $50.00 for the land taken, $1,500.00 for damages to the strip, and $1,600.00 for damages to the remainder, being in the aggregate $3,150.00.

The parcel referred to as the Stone farm, contains 35.43 acres. There will be 2 Type A structures, each 72 feet high, the area to be taken is .002 acres, and the easement strip contains 4.363 acres. The witnesses testified that the highest and best use

was for farming, and two witnesses testified that in addition to farm use, the parcel contained several desirable home sites. Petitioner's witnesses' valuations of the farm ranged from $250.00 to $350.00 per acre. Defendants' witnesses made no per acre valuation, and testified that the farm was worth $30,053.00. The testimony as to the value of the land to be taken for the structure sites ranged from 50¢ to $1,000.00, as to the damage to the working strip, from $327.22 to $7,366.00, as to the damage to the land outside the strip, from nothing to $13,175.00. The court awarded $200.00 for the land taken, $2,600.00 for damages to the strip, and $2,200.00 for damages to the remainder, being in the aggregate $5,000.00.

Exhibits offered by petitioner, and admitted into evidence, show the boundaries of the defendants' lands and the working strip, and the proposed locations of the transmission line and the supporting structures. Defendants' exhibits include aerial photographs of the farms. The record shows that the trial judge, accompanied by one of the defendants and an engineer employed by petitioner, viewed the premises.

Petitioner's complaints of error are, (a) the defendants' evidence of the value of the land taken, and of damages to the working strip, was improperly admitted, because the opinions of the witnesses were based on improper elements, and therefore, incompetent; (b) the awards for land taken are so excessive as to demonstrate a misconception of the willing buyer - willing seller concept of farm market value; (c) the trial court improperly ignored the testimony of petitioner's witnesses, which was the only competent evidence of value of land taken, and of damage to the easement strips;

(d) defendants failed to sustain the burden of proof that the lands outside the easement strips were damaged, and judgments should have been entered in petitioner's favor on the cross petitions; (e) the trial court improperly denied petitioner's motion to strike portions of the cross-petitions of the defendants, Montgomery and Kimmel, because portions of the lands therein described are not contiguous to the parcels affected, and could not, therefore, be damaged by the taking, (f) the court erred in admitting other evidence offered by defendants.

The measure of compensation for land actually taken and occupied by poles or structures is its fair, cash market value. The measure of damages to the lands within the working strips is the depreciation in the fair market value of the strips, exclusive of the structure sites, caused by its subjection to petitioner's easement. Central Illinois Public Service Company v. Lee, 409 Ill. 19.

Petitioner contends that the opinions of the defendants' witnesses as to the fair, cash market value of the land taken, and the damage to the land within the working strips, were based on improper elements, and therefore, incompetent. Two of defendants' witnesses testified as to the value of the land taken, damage to the working strips, and damage to the lands remaining, with respect to two of the farms, two other witnesses testified as to the other five farms, and one witness testified as to all seven parcels. The Memorandum of Judgment filed by the trial judge recites that the court allowed petitioner's motion to strike the testimony of this latter witness, and his testimony was not considered by the court in reaching its decision. Four witnesses were called by petitioner

and each of them testified as to all seven farms.

In its argument that the defendants' witnesses, in fixing the value of the land taken, ignored the willing seller - willing buyer concept of fair, cash market value, petitioner correctly states that the award of $100.00 for the taking of .001 of an acre results in a valuation of $100,000.00 per acre. From this premise, it argues that such a valuation is "fantastic" when the value of the farm containing many acres is substantially less than $100,000.00. We are not, however, persuaded that the sole method of determining the value of a structure site is to assign a per acre value to the parcel out of which it is taken, and thereupon compute the price on the basis of fractions or decimals of acre values. The value of single acres, or of parcels of equal size, whether larger or smaller than an acre, comprising a larger tract, are not necessarily equal.

The sums awarded by the trial judge for the land taken are within the range of values testified to by the witnesses, and the trial court viewed the premises. This court, on review, should not disturb the judgment where the findings of the trial court are within the range of values testified to by the witnesses, unless such findings appear to have been the result of prejudice, passion, undue influence, or other improper causes. City of Chicago v. Lord, 279 Ill. 582. A reviewing court must presume that, having heard the case without a jury, the trial court considered only competent evidence. Purcell v. Weasel, 12 Ill. 2d 356. We are, further, bound by the rule that even though the trial court may have erred in its rulings on evidentiary matters, the judgment should be affirmed if the record contains sufficient

competent evidence to sustain it, Maton Bros. v. Central Illinois Public Service Company, 356 Ill. 584. In addition to the competent evidence in the record, the trial court having viewed the premises, could consider the knowledge thus gained in making its findings. City of Chicago v. Lord, 279 Ill. 582.

In the course of thorough cross examination of defendants' witnesses, able, experienced counsel for petitioner elicited admissions that certain of the opinions as to the values of certain lands taken were based, in part, upon elements which have been held to be improper in one of the many cases cited in an excellent, comprehensive brief. A discussion of these elements would serve no useful purpose, since we do not question their impropriety, nor do we disagree with petitioner's contention that an opinion based in part upon proper, and in part upon improper, elements of damage, is not competent. From our examination of the evidence, we conclude that there is in the record competent evidence to sustain each award for land taken.

What we have said with respect to the evidence of value of lands taken, and of the rules governing our review of the sums awarded, is applicable as well to our review of the sums awarded for damage to the working strips. There is no dispute that damage resulted, and the amounts to which petitioner's witnesses testified ranged from 25 per cent to 70 per cent of the value of the land within the working strips, computed on the per acre valuation assigned by these witnesses. In examining the evidence, in the light of the above stated rules, we cannot say that the trial court erred in awarding the sums upon which the judgments are based.

Petitioner contends that there is no competent evidence of damage to the lands lying outside the easement strips, and as to this issue, argues that the judgments of the trial court should be reversed, and judgments entered in this court, on the issues raised by the cross-petitions. In reviewing the testimony, the rulings of the trial court, and the judgments pertinent to these claims of damage, we are guided by the basic rule for determination of just compensation for property taken in eminent domain, as stated by the Supreme Court in County School Trustees v. Elliott, 14 Ill. 2d 440, wherein at page 445, the Court said, "The law of eminent domain contemplates that where private property is taken for a public use, the owner is entitled to the amount of money necessary to put him in as good financial condition as he was with the ownership of his property at the time the petition was filed. Nothing short of that amount conforms to the constitutional requirement of just compensation."

The measure of damages to the remainder of the property not taken is the depreciation in the fair market value of the property as a whole caused by a direct physical disturbance of some right incident to its ownership, and it is not required to be estimated by the acre. Central Illinois Public Service Company v. Lee, 409 Ill. 19. The test of whether an alleged element of damage is properly to be considered in determining the extent of the damage suffered is that it must be direct and proximate, and not such as is merely possible, or may be conceived by the imagination. Illinois Power & Light Corp. v. Peterson, 322 Ill. 342, 349. "Direct physical disturbance of some right incident to ownership" has been held to arise from inconvenience in herding stock, the

cost of additional help (Department of Public Works v. Hubbard, 363 Ill. 99), inconvenience in farming, obstruction or interference on the farm land, shrinkage in area of the farm, (Illinois Power and Light Corp. v. Barnett, 338 Ill. 499), the presence of weeds and insects around the base of structures or towers, and interference with checking corn rows (Illinois Iowa Power Co. v. Rhein, 369 Ill. 584).

From our examination of the evidence, we conclude that there is competent evidence upon which to base the judgment that there was damage to the lands not taken, and the awards which range from 2 percent to 10 percent of the fair, cash market value of the farms prior to the taking, are not excessive. Illinois Iowa Power Co. v. Rhein, 369 Ill. 584.

Petitioner contends that the trial court erred in denying its motion to strike portions of the cross-petitions of the defendants, Montgomery and Kimmel.

The Montgomery farm, consisting of 353.87 acres, lies both to the east and to the west of the C. & E. I. Railroad, and a small triangular parcel lies south of a public road known as Holderfield Lane. The proposed power transmission line will not cross the land lying to the east of the railroad nor the land lying south of Holderfield Lane, and the distance from the transmission line to these parcels is, in one instance, 1/4 mile, and in the other 2300 feet. The testimony shows that there is a private crossing over the railroad which serves the defendant, Montgomery's lands, and those of another farmer. The land to the north of Holderfield Lane is fenced, that which lies south of the Lane is not fenced.

Ross S. Montgomery testified that the entire parcel of 353.87 acres is listed as a unit with the Department of Soil

Conservation and is farmed as a unit. Crops are rotated, and the land is fertilized, in accordance with the A.S.C. (Agricultural Stabilization and Conservation Service) program. Part of the farm has been used as a goose hunting area, and as the corn fields are rotated, the goose hunting pits are moved.

As previously stated, the Kimmel farm originally contained 282 acres. Approximately 51 acres were condemned and taken for the construction of Illinois State Routes 148 and 37, and Interstate Route 57. Two parcels totalling 24 acres, and lying on either side of Illinois State Route 148, near the interchange with Interstate Route 57, were sold to an oil company approximately two months prior to the filing of this petition. The proposed transmission line will cross defendant, Kimmel's, lands to the east of Route 148, and will cross parcels lying on both sides of Route 37.

In order to reach a part of the farm that lies to the northwest of Interstate Route 57, it is necessary to travel over a gravel road through an underpass under Interstate 57, a distance of a half mile.

Defendant, S. L. Kimmel, testified that the tracts are farmed as a unit, and in his overall farming operation one tract is dependent upon the other.

In City of Quincy v. Best Supply Co., 17 Ill. 2d 570, at page 572, the Supreme Court said: "We have previously determined that in order to recover damages in an eminent domain proceeding for property not actually taken, it must appear that this and the condemned land are contiguous, that is, they are either physically joined as a single unit or so inseparably connected in use that the taking of one will necessarily and permanently injure the other. City of

Chicago v. Equitable Life Assurance Society of the United States, 8 Ill. 2d 341."

Defendants, in support of their contention that the lands are contiguous, cite C. & P. R.R. Co. v. Hildebrand, 136 Ill. 467. Although recognizing that the farm in question was used as a unit, the peculiar circumstances of that case, because the taking was by the railroad whose right of way divided the farm, do not present nor decide the precise issue here presented as to the lands of the defendants, Montgomery. We have examined the authorities collected in the annotation in 6 A.L.R. 2d at page 1222, and conclude that the question of contiguity, under the evidence here, was a question of fact for the trial court. The testimony is sufficient to sustain a finding that the entire farm was damaged by the taking and the intervention of Holderfield Lane and the C. & E. I. right of way do not, as a matter of law, destroy the contiguity of those tracts.

As to the lands of defendants, Kimmel, the evidence shows that this farm originally was comprised of 282 acres, described by a witness as "seven contiguous forties". The exhibits show the working strip will run through the center of the tract lying sougheast of Route 37 and east of Route 148, which is the largest parcel left of the original 282 acres. It will also run through a triangular parcel which is bounded by Routes 148 and 37. Whether these parcels and the tract which lies west of Route 148 are contiguous was a question of fact for the trial court. Although a strong argument can be made that the parcel which lies west of Interstate Route 57 is not contiguous, the testimony of the defendants was that it was farmed as part of the same unit and we do not feel compelled to say that the trial court, as a matter of law

erred in refusing to consider the damage to this parcel. We are impressed by the fact that the sum awarded is less than 3 percent of the value assigned to this farm by the witnesses, and assume therefore, that in assessing the damage to the whole farm, the trial court did not allocate the damages equally to each acre affected. Based on the evidence, the award is reasonable and will not be disturbed.

Petitioner contends the court erred in admitting into evidence without proper foundation, a deed purporting to show the sale of a parcel of land allegedly comparable to one of the tracts in this case. In this regard, both sides have erred equally, because petitioner, over objection, proved the sum paid by one of the defendants for a parcel of land affected by the taking. In accordance with the applicable rule, we must presume that the trial court did not consider the evidence erroneously admitted.

Petitioner contends, and correctly, that the court erred in admitting testimony relating conversations with petitioner's right of way agent. This testimony was neither relevant nor material, but again, we presume it was not considered.

The trial of this case extended over a period of 6 days, and can best be described in the language of Mr. Justice House in Board of School Trustees v. Boram, 26 Ill. 2d 167, wherein at page 173, he wrote: "This was a hard fought case with neither counsel giving any quarter".

Confronted with the vast amount of testimony adduced by able counsel to prove the elusive intangibles of "fair cash market value" and "a direct physical disturbance of some right incident to ownership", it would indeed be remarkable if the record contained no error. Assuming error to exist, it must be examined and appraised on the basis of whether its entry into the case precluded either

party from having received the fair trial which our law contemplates, and whether, applying the presumption that evidence improperly admitted was not considered by the trial court, there remains competent evidence to sustain the judgment. It has been said by many courts that a litigant is entitled to a fair trial, not a perfect one.

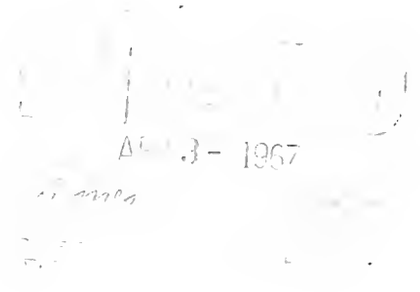
The judgments of the Circuit Court of Williamson County are affirmed.

Judgments Affirmed.

Concur: Edward C. Eberspacher

Concur: George J. Moran

PUBLISH ABSTRACT ONLY



Case No. 66-67

In The

APPELLATE COURT OF ILLINOIS

Third District

Abstract

A.D. 1967

DONNA JEAN ZUG, Plaintiff, Appellant	)	Appeal from the Circuit Court of the 14th Judicial Circuit, Rock Island County, Illinois
vs.	)	
JOHN ROY ZUG, Defendant-Appellee.	)	Honorable John L. Poole, Judge Presiding.

STOUDER, P.J.

Appellant, Donna Jean Tompkins, formerly Donna Jean Zug, was granted a divorce from Appellee, John Roy Zug in 1958 by the Circuit Court of Rock Island County. By the terms of the divorce decree, Appellant was granted custody of the two minor children of the marriage and Appellee was ordered to pay $20.00 per week for their support. In April, 1966, Appellant commenced contempt proceedings to enforce a support order. Appellee answered such petition denying that he was guilty of wilful contempt and asked that the decree be modified by reducing the support payments. It was stipulated by the parties that the arrearage in support payments was $5,112.00. The court after hearing evidence, found that Appellee was not guilty of wilful contempt, and reduced the amount of the weekly support from $20.00 to $15.00 per week. Appellant appeals from that part of the order modifying the divorce decree.

From the evidence it appears that Appellee was in the Armed Service from 1959 until 1961. He has been regularly employed for the last 3½ years, his employment prior thereto and subsequent to his discharge from the service being irregular. Appellee has visited the children and testified that they appeared to be in good health and were being well taken care of. His take home pay is $97.00 per week. In 1964

Appellee remarried and has one child of his second marriage. This child has since birth required substantial medical expenses because of a severe eczema. Appellee owns no property excepting his clothing and a television set which was a gift. His second wife does not work. It also appears that Appellant has remarried. The evidence also shows that after Appellee's discharge from the service he had conversations with Appellant and Appellant's husband to the effect that Appellee would not be required to support the children, such support to be provided by Appellant's husband so long as the latter was not "bothered" by his first wife. The possibility of adoption of the children by Appellant's husband was discussed but was opposed by Appellee. Appellee advised Appellant of his intended remarriage in 1964 but at no time subsequent to the conversation in 1961 was Appellee ever requested to contribute to the support of his children until the filing of the petition in 1966.

Appellant argues that the trial court's order reducing the weekly support payment was contrary to the law and the facts and therefore should be reversed. We have been referred to the well settled rule that the minor children of a marriage which has resulted in divorce are subject to continued supervision of the court and that the court is authorized to modify a provision for the support of such minors from time to time in accordance with changed conditions or circumstances. The changed circumstances referred to generally are the needs of the minors and the financial circumstances of the parents. Appellant insists that there is no evidence concerning a decrease in the needs of the children and that the only change in circumstances, relating to the financial circumstances of Appellee, is his remarriage and the additional obligations occurring as a consequence of said remarriage. As Appellant correctly points out we have repeatedly held that a parent's obligation to the children of a first marriage is his primary obligation and that voluntary obligations which may be incident to his second marriage are not such a change in circumstances as to effect his primary obligation. Gregory v. Gregory, 52 Ill. App. 2d 262, 202 N.E. 2d 139.

We believe that the foregoing rule is applicable to the facts of this case and that the order of the trial court is not supported by any competent evidence from which it can be inferred that the needs of the children are less or Appellee's ability to contribute to their support has been decreased. The trial court recognized that the evidence did not support any reduction in Appellee's obligation since the order which reduces the support payments from $20.00 to $15.00 per week also provided for the payment of $5.00 per week on the arrearage. Thereafter the court became aware that the provision concerning payment on arrearage was improper and it was struck from the order.

Since we find that the modification of the divorce decree is erroneous the order of the Circuit Court of Rock Island County modifying the decree is reversed and remanded with directions that the original provision in the decree relating to the support of the minor children be reinstated.

JUDGMENT REVERSED AND REMANDED WITH DIRECTIONS.

Alloy, J., and
Coryn, J. concur.

50960

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. JAMES A. SPENCER, Defendant-Appellant.	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY, CRIMINAL DIVISION.

MR. JUSTICE SCHWARTZ DELIVERED THE OPINION OF THE COURT.

The defendant after waiving his right to a trial by jury was found guilty of attempted burglary and sentenced to serve from three to eight years in the penitentiary. He now appeals from that judgment, contending that the State failed to prove him guilty beyond a reasonable doubt. The facts follow.

Mrs. Catherine Schwartz testified that she was in her second floor apartment at about 10:00 a.m. on April 27, 1965, when she heard the sound of a key being inserted in the lock of the door. This sound was followed by a scraping noise at the door, and she called out, "Who is there?" A man replied, "Is Mr. McNutt, the painter, there?" Mrs. Schwartz told the caller no such person was there, and she then heard the footsteps of a person rapidly descending the stairs. She went to her front window and saw a man leaving the building. She then went to an enclosed porch at the rear of the apartment and observed the man as he walked down a gangway and proceeded down the alley. She testified that she observed him for several minutes and was able to see his full face as he left the building and his profile as he walked through the gangway. She selected the defendant from a lineup and identified him as the person she had seen leaving the apartment building.

The arresting officers testified that the paint on the apartment door was chipped and that the moulding had been forced away from the door jamb. They further testified that they apprehended the defendant about a block away from the scene of the attempted burglary. The police found several keys in defendant's possession, one of which would fit into the lock on the apartment door but would not turn. They also testified that they searched the area where they arrested him and found a cast table knife. There were no identifiable fingerprints on it.

The testimony of one witness as to identification, if positive and credible, is sufficient to convict, even though the testimony is contradicted by the accused. People v. Tunstall, 17 Ill. 2d 160, 161 N.E.2d 300; People v. Mack, 25 Ill. 2d 416, 185 N.E.2d 154; People v. Williamson, Illinois Appellate Court Gen. No. 50894. In the instant case the witness had the opportunity to observe the man who left the apartment building after the attempted burglary, and she positively identified the defendant as that person.

The identification by the witness is supported by the testimony regarding the key and the table knife, showing that the defendant possessed the means with which to commit the crime in the manner described by the witness.

Where a case is tried by the court without a jury, the determination of the credibility of the witnesses and the weight to be accorded their testimony is committed to the trial judge, and unless the judgment is found to rest on doubtful, improbable or unsatisfactory evidence or clearly insufficient evidence, a reviewing court will not substitute

its judgment for that of the court below. People v. Clemons, 26 Ill. 2d 481, 187 N.E.2d 260; People v. Smith, 57 Ill. App. 2d 74, 206 N.E.2d 463.

In this case there was sufficient evidence to support the finding of guilty beyond a reasonable doubt. The judgment is accordingly affirmed.

Judgment affirmed.

Sullivan, P.J., and Dempsey, J., concur.

Abstract only.

81 I.A.2 386

Abstract

NO. 66-99

IN THE

APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

NATIONWIDE MUTUAL INSURANCE COMPANY, a corporation, Plaintiff-Appellant, vs. PAUL C. CHRISTAKIS, Defendant-Appellee.	Appeal from the Circuit Court of Lake County, Illinois, 19th Judicial Circuit

MR. JUSTICE MORAN DELIVERED THE OPINION OF THE COURT:

The plaintiff, Nationwide Mutual Insurance Company, a corporation, employed the defendant, Paul C. Christakis, as an insurance agent on a commission basis. In addition, the defendant entered into a contract with the plaintiff which was known as a Career Agents Financing Plan. The contract provided that the defendant could draw advances against future commissions to become due him as an agent for the plaintiff, but, any excess of advances over commissions due would become a debt due to the plaintiff regardless of continued employment.

From August 31, 1962 through July 19, 1963, the plaintiff advanced the sum of $5405.00 to the defendant at the rate of $110.00 per week. During the same period of time the defendant earned $2839.33 by way of commissions due. After July 19, 1963, the defendant refused to accept any further advances, and, on October 4, 1963, he informed the plaintiff that he intended to resign. This was accomplished by the plaintiff sending him a letter terminating his employment on December 4, 1963.

Suit was instituted before a jury in the Magistrate Court of Lake County for the recovery of excess advances over commissions earned which amounted to $2565.67. The jury found in favor of the defendant and a judgment was entered upon the verdict. The plaintiff filed post-trial motions seeking to vacate the judgment, and for the entry of an order in its behalf non obstante veredicto. In addition, a motion for a new trial and a motion in arrest of judgment were also filed. It is from a denial of these motions that the plaintiff brings this appeal.

The plaintiff conformed with the rules of this Court and perfected his appeal; however, the defendant, after being allowed two extensions of time in which to file his brief, has failed to do so. Oral argument was not requested by the plaintiff, and we took the case under advisement during the February session.

It has long been the rule that where an appellee fails to file a brief, as provided by rule, the Court need not examine the record in detail or discuss the case at length, but may reverse and remand the cause. I. L. P., Appeal and Error, Sec. 560. See also, Cole v Willhoft, 73 Ill. App. 2d, 208 (1966); Paulson v Ades, 71 Ill. App. 2d, 464 (1966) and Wieboldt Stores, Inc. v Mautner, 61 Ill. App. 2d 368 (1965).

The plaintiff prays that this Court enter a judgment non obstante veredicto in the sum of $2565.67 or, in the alternative, that the trial court be reversed and the case be remanded for a new trial. We believe it appropriate to grant the alternative relief prayed for, therefore, this case is reversed and remanded for a new trial.

REVERSED AND REMANDED

DAVIS, P.J., and ABRAHAMSON, J., concur.

50843

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. CLEOPHIS SIMS, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a bench trial, defendant was found guilty of robbery and sentenced to two to five years. On appeal, defendant's sole contention is that he was not proved guilty beyond a reasonable doubt.

The complaining witness, Jewel Rhodes, testified that at about three o'clock on the morning of October 26, 1964, he was asleep on the front seat of an automobile, which was parked at about 1315 Newberry Street, Chicago. He was awakened, and a voice told him to sit up. He saw a gun barrel on the left side of his face, and "I just looked at the floor. I could feel somebody going through my pockets. My left pants pocket. My wallet was taken and I was told to lay down on the seat and be quiet. The car door was open. Approximately fifteen dollars was in my wallet." He saw no person. Within a couple of minutes the police arrived in a squad car, and he told them what happened.

Two police officers, John Harris and Henry Brown, testified that about 3:00 A.M. on October 26, 1964, they were patrolling south in the 1300 block of Newberry Street in a marked squad car. They observed two male Negroes near a parked car, a tan 1963 Buick. One of the men was "leaning on the inside of the car," and "the next man was standing next to the door." They

pulled up to the curb about 20 feet behind the parked car and called to the two men, who came over to the car. Both of the officers testified that one of the two men was the defendant, Sims; that for a year and a half or two years they had known Sims as "Clarence"; and that it was Sims who was leaning inside the car.

Officer Harris testified that Sims leaned down to the car and looked in and said to him, "'How are you doing, man?' I said, O.K. My partner started to get out of the car. He said just a minute. Let's see what you've got. Just as he started to open the door, the two men ran. My partner got out and ran after them. I backed the car up and turned around and went around the block to head them off. I lost them in the dark. * * * We went back to the car. It was a 1963 Buick. It was brown. I saw a man I later met and found out was Mr. Rhodes. He was on the floor in the front seat." The next time he saw Sims was on November 3, at 1319 South Newberry. Officer Brown was with him, and "we took him down to the squad. He said, 'Yes, I did it,' and 'You've been knowing me, man. You can go along with me. Give me a break. No one knows about it but you.'"

Defendant denied the robbery and denied ever having seen the complaining witness until the trial. He further testified that he knew the two police officers, and that on October 28 or 29, 1964, Officer Harris questioned him concerning gambling offenses in the neighborhood and solicited $100; that on November 3, at the police station, Officer Harris again asked for $100 and offered to clear up the matter, and defendant said, "I don't have any money. I haven't robbed anybody."

Defendant argues that even when viewed in the light most favorable to the State, the evidence introduced in the trial court did not prove beyond a reasonable doubt that the defendant committed the crime with which he was charged. Defendant emphasizes that he denied the charge and testified to a version of his arrest that contradicted the police officers in a manner that was not met in rebuttal; that the complaining witness did not identify either of the two men whom the officers allegedly had seen at the 1963 Buick, and according to the two officers, other than seeing one of the men leaning into the car, they saw nothing unusual. Defendant further argues that proof that the defendant ran from the scene of the alleged crime does not prove him guilty beyond a reasonable doubt. People v. Davis, 69 Ill. App.2d 120, 216 N.E.2d 490 (1966). Defendant states that it is peculiar that both officers knew the defendant and where he lived, and yet he was not arrested until eight days after the event. Conceding that the determination of the credibility of witnesses is for the trial judge, defendant asserts that "these contradictory facts show the legal insufficiency of the State's evidence," and cites in support People v. Buchholz, 363 Ill. 270, 2 N.E.2d 80 (1936), and People v. Rossililli, 24 Ill.2d 341, 181 N.E.2d 114 (1962), where convictions were reversed because the evidence was insufficient.

The State contends that the evidence overwhelmingly proved the defendant guilty; also, that the weight and credibility of the witnesses was a function of the trial court, and in a criminal case "the reviewing court will not disturb the finding of the trial judge, particularly where the conviction

depends so entirely on matters of credibility, unless the evidence is so palpably contrary to the finding or so unreasonable, improbable and unsatisfactory as to justify the reviewing court to entertain reasonable doubt as to the defendant's guilt." People v. Hill, 61 Ill. App.2d 16, 23, 208 N.E.2d 874 (1965).

The State points out that the officers testified that during the period of time between the robbery and the arrest, they were trying to locate the defendant; they knew he lived in the neighborhood but didn't know where he lived until the night before they arrested him.

This record contains the testimony of a victim of a robbery and the positive identification of the defendant by two police officers, who saw him "leaning on the inside of the car" in which the complaining witness was found shortly thereafter; also, when questioned, defendant fled from the police officers. The record further indicates that the contentions made on appeal were also made during the trial, and we cannot say that the proof here is insufficient to sustain the conviction or so unsatisfactory as to justify this court in substituting its judgment for that of the trial court.

For the reasons given, the judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

51208

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, v. WILLIAM LEE HARRIS, Defendant-Appellant.	APPEAL FROM CIRCUIT COURT, COOK COUNTY, CRIMINAL DIVISION.

MR. PRESIDING JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

After a bench trial, defendant was found guilty of the statutory offense of "theft" and was sentenced to five to nine years. On appeal, defendant contends (1) that the indictment was insufficient to support the sentence; and (2) that the State failed to prove beyond all reasonable doubt that defendant possessed the necessary mental state required for a finding of guilty of theft.

The complainant, Betty Welter, testified that on August 18, 1965, at about 4:00 A.M., she was walking at Canal and Jackson, after leaving her place of employment. A man grabbed her purse and sweater and ran. She called the police, and they drove around the neighborhood and found the defendant in some weeds, with her purse.

Police Officer Donald Cook testified that the man found in the weeds was the defendant. He further testified that when the defendant was found, "he was just laying there, now, like he was either out or drunk or asleep. I don't know,"--he could barely stand up, and he talked incoherently. The police report was marked to indicate that defendant "had been drinking."

The defendant denied taking the purse or having any knowledge of the theft. He further testified to an alibi: that he had been in police custody since 11:30 P.M. the evening

before, having been "picked up" while walking down Madison Street, by the same officers who testified they had found him in the weeds with the purse of the complaining witness. He denied that he had been drinking and said, "Didn't drink anything but some beer and that is what had me all swelled up." He said the officers did not tell him why they arrested him, and the first time he saw Miss Welter was "when they brought her up with them. I didn't see her before," and he did not take her purse.

Initially, defendant contends that voluntary intoxication is an affirmative defense, if the intoxication prevents the actor from possessing the required mental state (Ill. Rev. Stat., Ch. 38, §§ 6-2,-4), and once the issue involved in an affirmative defense is raised, the State must sustain the burden of proving the defendant guilty beyond a reasonable doubt as to that issue together with all other elements of the offense (Ch. 38, § 3-2).

Defendant asserts that the testimony of the police raised substantial doubt as to whether defendant possessed the necessary mental state to have knowingly performed the alleged acts sufficient to be guilty of the crime of theft, and the failure of the State to prove that defendant possessed the necessary mental state requires a reversal. Defendant's alleged intoxication was neither urged nor argued as a defense during his trial. In finding defendant guilty as charged in the indictment, the trial court considered all of the evidence and stated it was "overwhelming" and that "the Court considers incredible" the statement by defendant. The record affirmatively indicates that the trial court believed that defendant possessed the necessary mental state.

Next considered is defendant's contention that the indictment was insufficient to allege a theft from a person, although such a theft was demonstrated by the evidence. Defendant asserts that the indictment mentions "theft from the person" only in the caption of the indictment; further, nowhere in the recitation of the allegations of the indictment is it alleged that the purse was obtained from the person of the complainant, and an offense must be stated in the indictment. (People v. Pronger, 48 Ill. App.2d 477, 199 N.E.2d 239 (1964).) Defendant argues that he cannot be sentenced for the crime of theft from a person where the indictment charged only the separate crime of theft, and this court should therefore reduce the sentence imposed or reverse the conviction for the purpose of the imposition of a proper sentence.

The State notes that the indictment in this cause alleges that defendant "knowingly obtained unauthorized control over a purse of the value of less than one hundred fifty dollars, the property of Betty R. Welter, intending to deprive the said Betty R. Welter permanently of the use and benefit of said purse in violation of Chapter 38, Sec. 16-1(a) of the Illinois Revised Statutes * * *."

We find no merit in defendant's contention. We agree with the State that an indictment need not specifically allege a theft from the person. In People v. Jackson, 66 Ill. App.2d 276, 214 N.E.2d 316 (1966), it is said (p. 279):

> "Section 16-1 describes the offense of theft only--and this was the precise purpose of the legislature in enacting this provision of the code. The purpose was to substitute a generic definition of theft for various statutes which particularized different kinds of larceny. * * * [p. 280] The legislature did not, as the

> defendant argues, attempt to create the crime of theft from the person in the penalty portion of section 16-1 rather than in the descriptive portion. The penalty portion merely makes distinctions between different grades of theft and provides aggravated penalties for aggravated degrees and forms of theft. * * * The test to be applied to a penal statute is whether it is sufficiently definite and certain to enable all men to know what acts are proscribed and what conduct will make them liable to punishment. * * * The language of section 16-1 meets this test. Theft is explicitly described and the penalties for the offense are clearly set forth."

As to defendant's sentence, the State points out that the defendant was on parole at the time of his arrest for the instant offense, and after finding defendant guilty, the court asked defense counsel what sentence he would recommend, and he replied, "If he is going to get seven years on his parole, and not going to be out until he is forty-six years old, a year or two added to that would be certainly adequate time." From this the State asserts that the court actually sentenced this defendant to two years' time in addition to the seven years he had left in his old sentence. As the record substantiates this statement, and as defendant was sentenced to a term within the statutory limits for a conviction "of theft of property from the person," we find no error here.

For the reasons given, the judgment of the Criminal Division of the Circuit Court of Cook County is affirmed.

AFFIRMED.

BURMAN and ADESKO, JJ., concur.

Abstract only.

M51245

IN RE ESTATE OF T. B. DUKES JAMES GIBSON, Plaintiff-Appellant, vs. MATTIE WILLIAMS, Defendant-Appellee.	APPEAL FROM JUDGMENT OF THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS, COUNTY DEPARTMENT, PROBATE DIVISION.

MR. JUSTICE BURMAN DELIVERED THE OPINION OF THE COURT.

In this action an order was entered by the Probate Division declaring Mattie Dukes Williams to be the only heir at law in the estate of Theodore B. Dukes. James Gibson appeals from an order entered on January 20, 1966, in which his petition to correct the table of heirship was denied.

The record establishes that on January 21, 1964, Mattie Dukes Williams was appointed as administratrix of the deceased and on that day she testified in the matter of proof of heirship that she, as the sister of the deceased, was the only surviving heir. On December 28, 1964, testimony was taken in the matter of an amendment to the proof of heirship and Mattie D. Williams testified that she was an adopted sister of the deceased.

On February 18, 1965, a Petition to Remove Administratrix was filed by James Gibson which alleged that he was a collateral heir of the deceased and that the deceased had no blood relatives; that Mattie D. Williams failed to file a true and correct inventory, but filed a sham one concealing the true assets; that she was guilty of mismanagement of the estate and that she failed to establish heirship. On March 18th, Mattie Williams filed an answer to Gibson's petition in which she denied the allegations therein or demanded strict proof.

An amended intervening petition was filed by James Gibson on June 3rd, 1965, in which he stated that Mattie Williams based her claim as an heir at law to the estate of Theodore B. Dukes on an adoption order issued by the Probate Court of Drew County, Arkansas which order found Mattie Williams to be the adoptee of Dr. G. D. Dukes, father of Theodore Dukes. It was alleged that in a later proceeding an Arkansas court held the order of adoption on which the plaintiff based her claim as an heir of Dr. G. D. Dukes as void and that this order is still in full force and effect estopping Mattie Williams "from again litigating the same issue (her adoption) in this court." It was further alleged that the testimony of Mattie Williams indicates that Dr. G. D. Dukes, the adopting parent, was a married man; that he was not joined by his wife in attempting to adopt Mattie Williams and that an adoption proceeding not joined by the other spouse is contrary to the Arkansas and Illinois Statutes and therefore void. Wherefore he prayed that the claim of Mattie Williams to share in the estate of T. B. Dukes, as his adopted sister and only heir, be dismissed and the table of heirship be amended.

On August 11, 1965, the Probate Division of the Circuit Court of Cook County entered an order which recited that the court having heard evidence and having considered copies of a decree of divorce and a decree of adoption, found that Theodore B. Dukes, deceased, left surviving as his only heir and next of kin, "Mattie Dukes Williams, wife of Bishop William D. C. Williams, his sister by adoption." The final decree of divorce considered in these proceedings was entered on November 3, 1920, in Chicot Chancery Court, Arkansas, in which Theodore B. Dukes was divorced from Willie Dukes. The adoption order also considered was entered

in the Probate Court of Drew County, Arkansas, in the October 1912 term. It recited that the petitioner, Dr. G. D. Dukes, desired to adopt Mattie and it was decreed that Mattie was adopted by Dr. G. D. Dukes, "to share equally in the estate of the said Dr. G. D. Dukes as if born a natural child."

On November 19, 1965, Mattie D. Williams filed an answer to the amended petition of James Gibson. She alleged that she was informed by her former attorney that her adoption papers were held to be defective, but that he did not disclose any defects. When she employed another attorney he advised her that it was defective in that it failed to show that the minor child was a resident of Drew County and was not signed by the presiding judge. For that reason she said she obtained a nunc pro tunc order which was entered in the Probate Court of Drew County, Arkansas, on October 28, 1965, correcting those minor defects in the adoption order entered at the October Term, 1912, and she attached a copy of the order to her answer.

A reply to this answer was filed by James Gibson which alleged that the County Court of Drew County was without jurisdiction to enter the nunc pro tunc order of adoption; that the nunc pro tunc proceeding was instituted in the name of a deceased person; that parties in interest and necessary parties were not made parties in violation of statute and that the claim was barred by laches.

We first consider the contention of James Gibson that the original Arkansas adoption order was contrary to its statutes and void because the petition for adoption was not joined by the wife of Dr. G. D. Dukes. The Arkansas Statute at the time of the petition and of the entry of the order of adoption of Mattie

Williams on October 29, 1912, did not require that the petition for adoption be signed by both husband and wife for the purpose of inheritance. It then provided that, "Any person desirous of adopting any child may file his petition therefor in the Probate Court in the county where such child resides." Ark. Act, February 25, 1885, § 1341. The requirement that a petition for adoption be signed by both husband and wife did not become a part of the Arkansas adoption statute until 1935.

James Gibson also argues that the Arkansas nunc pro tunc adoption order was improperly brought in the name of Dr. G. D. Dukes who was then deceased and is therefore void. He argues further that contrary to statute the necessary parties were not made defendants and that the power to order the entry of judgment nunc pro tunc cannot be used for the purpose of correcting judicial errors or omissions of the court, nor be used to give life to or to validate a void judgment, or to change or revise one.

We find no merit to the contention that the nunc pro tunc order named G. D. Dukes, deceased, as party plaintiff and was therefore void. It clearly appears that the matter was considered from the documents filed in the original proceedings as a matter of course. In regard to the contention that judgments nunc pro tunc cannot be used for the purpose of correcting judicial errors or omissions by the court the cases of Southern Farm Bureau v. Robinson, 238 Ark. 159, 379 S.W.2d 8 and Fitzjarrald v. Fitzjarrald, 233 Ark. 328, 344 S.W.2d 584 are cited. In the Southern Farm Bureau case the court said that there can be little doubt about the power of a trial court to entertain and grant an order nunc pro tunc even during or after appeal. This case does not

support Gibson, but to the contrary the court held that the nunc pro tunc order merely corrected the interest on a judgment and concluded that it was properly entered to cause the judgment to speak the truth. In Fitzjarrald the court also stated that a court has inherent power to enter nunc pro tunc orders, but concluded that the order erroneously amended a 16 year old divorce decree to include a provision for child support which was not considered in the original decree. The court went on to say that since this was not a nunc pro tunc order attempting to correct a clerical misprisón or mistake, the amended decree must be reversed and remanded.

[1] In the case at bar the nunc pro tunc order merely corrected an obvious clerical misprison or mistake. It is clearly within the province of the court to correct such errors in an order of adoption. Ward v. Magness, 75 Ark. 12, 86 S.W. 822. It is also contended that new matter was alleged in Gibson's reply pleading and that the failure to file an answer thereto admitted the allegations. We have examined the pleadings and are satisfied that it was superfluous and unnecessary to reply because no new issue was raised. Schiff v. Schiff, 25 Ill. App.2d 157, 165 N.E.2d 713; City of Flora v. Bryden, 300 Ill. App.2d 1, 21 N.E.2d 323. What we have said heretofore disposes of other contentions made by Gibson.

The judgment of the County Department Probate Division of the Circuit Court is correct and affirmed.

JUDGMENT AFFIRMED.

MURPHY, P.J., and ADESKO, J., concur.

Abstract only.

81 I.A.2 465

STATE OF ILLINOIS

APPELLATE COURT

FOURTH DISTRICT

General No. M-10796 Agenda No. 66-91

Patricia Jordine,

Plaintiff-Appellee

vs.

Metropolitan Life Insurance Company, a Corporation,

Defendant-Appellant

Appeal from Circuit Court McLean County

TRAPP, J.

Defendant appeals from a judgment entered following a trial before the court upon plaintiff's claim under a group insurance policy providing, among other coverages, weekly sickness and accident insurance, and referred to by the parties as non-occupational disability coverage. Defendant contends that it was error to deny its motion for judgment at the close of plaintiff's evidence.

It is urged on appeal that there is no evidence of disability other than the testimony of defendant's examining physician that plaintiff was unable to work on the particular day of his examination, and that there is no evidence of meeting a condition precedent in the policy that the plaintiff be under medical care for disability, so that as a matter of law

she was not entitled to recover.

Plaintiff's employer, General Electric Company, had a policy with the defendant providing group insurance for its employees. An employee did not receive an insurance policy or other form of contract, but was given a pamphlet entitled "General Electric Insurance Plan", describing the several types of coverage provided. The claim at issue arises under a coverage designated "Weekly Sickness and Accident Insurance".

Plaintiff testified that on April 13, 1965, as she was en route to work, she had pain in the back and pelvic region so that she felt unable to work, and thereupon went to her family physician. She had been experiencing these symptoms for a month. The latter, after examination, prescribed bed rest. The plaintiff speaks of being on sick leave from her employment until she returned to work on August 2nd. Plaintiff described the work at which she was employed, and her duties with the opportunities to rest while at work operating a machine. During the period of sick leave she described her activities as getting up to see that her children were dressed, doing a small amount of cooking and putting laundry into the machine, but she was in bed most of the time with the major household activities being performed by her husband.

On June 11, 1965, defendant procured examination of the plaintiff by a doctor. No diagnosis appears in the record, and it appears that his testimony is upon questions directed to his report of the examination made of the defendant. Such report is

not in evidence, but from the testimony we gather that defendant's doctor concluded that the plaintiff's symptoms were verified by abdominal spasms ascertained objectively, and that the treatment was bed rest with recovery to be expected within two or three months in cases of this type. He did not feel that it was his employment to prescribe medication and did not so prescribe. Upon cross-examination, the doctor testified that following the rest she was the one to decide whether or not she could return to work.

Defendant argues that the coverage is only for total disability as distinguished from occupational disability, and that the evidence does not show plaintiff's inability to do any work at any time. The complaint contains the allegation that the plaintiff was unable to perform the duties of her occupation. What coverage existed must be determined from the pamphlet supplied to plaintiff as evidence of her insurance coverage. Its language is of general, gentle benevolence as distinguished from the more formal and rigid language of a contract. Reference to the weekly sickness and accident insurance provisions is to be found upon several pages of the pamphlet. This coverage is first specifically referred to in terms of non-occupational sickness or accident which "....keeps you away from your job....", and described the benefit as an ammount equal to one-half of straight time weekly earnings with minimum and maximum amounts continuing for as long as 26 weeks. It also provides that "If

you lose time because of on-the-job sickness or accident....", payments of benefits would be made in amounts to supplement Workmens Compensation payments so that they would equal the weekly earnings provision first provided. A salaried employee would receive payments supplementing salary continuance, and thereafter receive the benefits specified. In this part of the pamphlet there is no reference to total disability.

The pamphlet contains subsequent provision for the described coverage under a heading "Benefits For Non-Occupational Disabilities". The language in this instance is:

> " If you become totally disabled as a result of non-occupational sickness or accident while you are participating in this Plan...."

and provides for minimum weekly benefits to continue up to a maximum of 26 weeks, and distinguishes the date of commencing the payments in the instance of confinement in a hospital or otherwise. This section of the pamphlet also refers to "Benefits For Occupational Disabilities" and to benefits received as Workmens Compensation or for occupational diseases, providing that the Plan would give benefits raising such compensation to the amount provided by the Plan.

A subsequent section of the pamphlet is headed by the legend "Provisions Applicable If You Are Absent From Work". This section has a sub-division entitled "Total Disability", and makes reference to the continuance of the coverage if totally disabled. The benefits under this coverage will be discontinued

on the date of ceasing active work, except that if one is entitled to weekly benefits for disability existing on the date of such cessation the insurance will be continued until the expiration of the maximum period for which benefits are payable for such disability. This paragraph contains both references to total disability and to weekly benefits for disability. The succeeding paragraph makes provision for the waiver of premium on life insurance protection in the following language:

> " If before age 60....you had become totally disabled which, for purposes of this paragraph only, means total disability as a result of bodily injury or disease so as to be wholly prevented thereby from engaging in any or every business or occupation and from performing any work for compensation or profit...." (Emphasis supplied).

The pamphlet has a section entitled "Definitions" and includes a definition of the term "non-occupational" as any sickness or injury not arising out of or in the course of employment and not entitling the employee to benefits under Workmens Compensation or Occupational Diseases statutes. There is no definition of total disability in such section.

The trial magistrate prepared and filed a memorandum noting particularly the provisions of the pamphlet regarding non-occupational sickness or accident which "....keeps you away from your job....", and concluded that the coverage was for an occupational disability rather than a total disability.

Defendant urges that the case must be determined upon the definition of total disability as found in cited authorities, including Lincoln v. Prudential Ins. Co., 345 Ill. App. 547; 104 N. E.2d 347; Aronson v. Mutual Life Insurance Co. of New York, 313 Ill. App. 35; 38 N. E.2d 976 and Buffo v. Metropolitan Life Ins. Co., 277 Ill. App. 366, and insists that the plaintiff has failed to prove that she could not do any work. In each of these cases a policy was issued to the insured which defined total disability in terms of being unable to engage in any work for any kind of compensation. The policies paid specified contractual amounts rather than being correlated to the weekly wage, and the obligation to pay provided continued indefinitely and permanently, rather than for a specific limited maximum period specified here. Such policies were discussed by the court in terms of "loss of livelihood". The coverage provided here is distinctly different. In a light most favorable to the views of the defendant, the pamphlet was, at best, ambiguous. The term "total disability" is confused, if not directly contradicted, by repeated inferences to occupational and non-occupational disability for which benefits were to be paid. This is particularly so when benefits are keyed to the weekly wage of an insured who is described as losing time from his employment, or being kept away from his job. When total disability is defined, it is limited specifically to one paragraph relating to waiver of premium upon life insurance, although the same section of the pamphlet contains other paragraphs relating to "total

disability" for purposes of this coverage.

It is the defendant who composed the language providing the coverage, and under such circumstances the ambiguities and uncertainties arising from the words used must be resolved against the defendant. Aronson v. Mutual Life Insurance Co., 313 Ill. App. 35; 38 N. E.2d 976. We conclude, therefore, that the coverage provided is not the defined total disability for which defendant contends.

The motion at issue includes the proposition that the plaintiff must:

> "....be under the treatment of a physician. The plaintiff was not entitled to decide as to when she could return to work, without a physician's recommendation which was never made. That only a physician is competent to decide when a patient is able to return to work within the meaning of the terms of the policy."

If this language means that plaintiff was not entitled to return to work, or was unfit to do so, we do not believe that such contention is a proper issue under the pleadings.

The complaint alleges that the plaintiff performed all conditions in said booklet to be performed by her. The answer denies such allegation, and denies that the plaintiff was under the care of a physician for treatment. As an affirmative defense, the answer alleges that the defendant was able to perform work but voluntarily chose to take leave of absence to do housework. No evidence to sustain this affirmative defense is found.

The section of the booklet discussing the weekly sick-

ness and accident coverage includes a sentence:

> " Of course, to collect these benefits you must be under the care of a physician for the treatment of your disability and your claim must be certified by a physician."

We find no contention that plaintiff's claim failed in the requisite certification.

A subsequent section of the pamphlet is entitled "Claims For Benefits" and recites that benefits are payable upon receipt of proof of claim; that claims should be filed promptly upon forms to be obtained locally and that proof of claim must be filed not later than 90 days after the calendar year in which the loss for which claim is made is incurred. This section includes the sentence:

> " The insurance company reserves the right to medically examine the individual for whom claim is made."

The record does not contain the claim filed, and we are unable to ascertain whether such forms contained any more specific direction than provided in the booklet. It is a fair inference that a claim was filed from the fact that the defendant requested, or required, a medical examination. We find no instruction or provision requiring a regular medical examination, or repeated certification to determine the continuance of a disability. Any specific procedure contemplated by the defendant as a condition precedent is not available from the pamphlet.

Defendant cites Commercial Casualty Ins. Co. v. Campfield, 243 Ill. App. 453 and Moore v. Standard Accident Insurance Co., 245

Ill. App. 300, as authority requiring that plaintiff show regular medical care. In the former case, the policy required "regular treatment" during the period of disability. However such provision may be defined, it is not required here by the language of the pamphlet. Each authority actually held that where there was such disability that regular medical treatment would not bring improvement of the condition, recovery under the policy would not be defeated by such fact.

All of the evidence is that the essential treatment for plaintiff's disability was bed rest. It is difficult to reconcile such treatment with other than total disability. The physician examining plaintiff at the request of the defendant adopted this position, and testified that the patient herself could best determine when she had the capacity to return to work. Such conclusion is consistent with all of the evidence in the record, and the evidence is that plaintiff recovered within the span of time predicted by defendant's examining physician. Upon this record, the judgment of the trial magistrate is affirmed.

AFFIRMED.

CRAVEN, P. J. and SMITH, J. concur.